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EMPLOYER- EMPLOYEE Relations in the Public Service of Canada

Proposals for
Legislative Change
Part I

J. FINKELMAN Q.C.

Chairman, Public Service Staff Relations Board



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(17)

EMPLOYER-EMPLOYEE RELATIONS IN THE

PUBLIC SERVICE OF CANADA

Proposals For Legislative Change

PART I

March 1974

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aux Communes

April 18, 1973.

Dear Mr. Finkelman:

Although you have no doubt read by now my statement in the House of Commons on Tuesday of this week in which I made reference to the fact that the Government has requested you to undertake a review of the Public Service Staff Relations Act, I did want to write to you personally to thank you for agreeing to undertake this most important task.

Your terms of reference as outlined by me in the House were as follows:

"It is recommended that Jacob Finkelman, Q.C. be authorized:

to examine the Public Service Staff Relations Act and its administration and to make recommendations, having regard to the experience gained since that act came into force, as to how it should be amended or revised in order to meet adequately the needs of the employer and the employees in the Public Service and the employee organizations that represent them, and to serve the interest of the public. An integral part of this review will be a consideration of the administrative framework required for the effective administration of the provisions of the act."

Although no mention is made in your terms of reference to consideration of related acts, such as the Public Service Employment Act, you are not precluded from consider-

Mr. J. Finkelman, Chairman
Public Service Staff Relations Board
Export Development Building
110 O'Connor Street
OTTAWA, Ontario
K1P 5V2

ing and making recommendations with respect to the sections of those other acts which are affected by the recommendations you wish to make regarding the Public Service Staff Relations Act. I am sure that you are the person best able to decide what is relevant in this regard.

I anticipated in my remarks that your study would be available in the early fall if it is possible to appoint some Deputy Chairmen immediately to relieve you of some of your present responsibilities. I trust that this time limitation will not create any undue problems.

I would appreciate being informed periodically of your progress in this matter. Should any difficulties arise please feel free to contact my office.

Sincerely,


Allan J. MacEachen.

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PREFACE

At the time I accepted the responsibility of undertaking a review of the Public Service Staff Relations Act, it was expected that I would be able to detach myself from day to day involvement in the work of the Board within a few weeks and to complete my review of the legislation in the autumn. As matters turned out, I was not able to devote the major portion of my time to the project until well into the month of August.

In the meantime, I invited the bargaining agents, the Secretariat of the Treasury Board and the separate employers to whom the legislation applied to submit to me written representations setting forth their views as to the changes that should be made. In due course, briefs were filed by almost all certified bargaining agents, by the Treasury Board Secretariat and by several of the separate employers. Written representations were also made to me by the Canadian Manufacturers Association, the Canadian Labour Congress, several other organizations and a number of private individuals.

Late in July, 1973, I began to hold meetings with those who had submitted briefs and, in the months since then, I have met with all the employee organizations who had been certified as bargaining agents for units of employees in the Public Service, including several who had not submitted written briefs, with the Treasury Board Secretariat, and with some of the separate employers. A number of the meetings lasted several days and none of the meetings was terminated until every opportunity had been given to those present to discuss every matter they wished to raise.

In the course of these discussions, and in my subsequent deliberations, I was assisted by Mrs. Gladys Choquette, a member of the legal staff of the Board, by Mr. Howard Goldblatt, who organized the research material

required for the review, and by Messrs. Hugh Tolan, Robert DesLauriers and Paul Roddick, who participated actively in my examination of the experience of the Board and of the parties since 1967 and my evaluation of alternative courses of action which I might recommend. Mr. Tolan, who has had many years of experience both as a negotiator and a manpower planning officer with the Canadian National Railways and in the Treasury Board Secretariat, was made available to me by the Treasury Board. Mr. DesLauriers, now Director of Research for the Public Service Alliance of Canada and previously an officer of the Pay Research Bureau, was made available to me for this review by the Alliance. Mr. Roddick, Director of Policy Analysis (Welfare) in the Department of National Health and Welfare, who had been actively involved as both Staff Officer and Secretary to the Preparatory Committee on Collective Bargaining when the Public Service legislation was originally developed, was loaned for this review by his department.

I am grateful to the officers concerned for the enthusiasm and dedication they brought to the review. However, I would point out that responsibility for the recommendations I have made rests solely with myself. I am deeply indebted to the senior officers of the Treasury Board, the Public Service Alliance of Canada and the Department of National Health and Welfare who subordinated their own interests in order to make members of their staff available. My indebtedness extends as well to my colleagues Mr. Georges E. Gauthier, Vice-Chairman and Mr. Marcel Garneau, Secretary of the Public Service Staff Relations Board, and Mr. E. B. Jolliffe, Chief Adjudicator under the Public Service Staff Relations Act, for their advice, counsel and forbearance throughout the period that I have been engaged on the report. I would also mention the invaluable assistance afforded to me on various

aspects of the review by Mr. Jaffray Wilkins, Director of the Pay Research Bureau, and Mr. Felix Quinet, Assistant Director (Research) of the Bureau. I also want to express my appreciation for the time and effort expended by all those who contributed to the preparation of briefs and memoranda and who argued their cases so ably, but without rancour, in the course of our extensive and sometimes spirited examination of the issues involved.

Last, but not least, I must place on record my thanks for the efficient and conscientious work in typing and clerical assistance given me by Miss Georgette Cyr and Mrs. Anna Harding.

In conclusion, my report will consist of three parts (three volumes): Part I, which is the report "proper," Part II, a summary of the recommendations contained in Part I, and Part III, a draft of the legislation, giving expression to my recommendations, that I prepared at the request of the President of the Privy Council to facilitate consideration of the report by those concerned. Because of the exigencies of time, Parts I and II are being made available before Part III has been completed.

March 1, 1974

A handwritten signature in dark ink, consisting of a stylized capital 'A' followed by a cursive name that appears to be 'Aul'.

Chapter 1

INTRODUCTION

1. In 1190, Maïmonides completed his great work Guide for the Perplexed - "to promote the true understanding of the real spirit of the law ...". The goals of this report are much more limited. Its author hastens to disclaim any capacity, or even desire, to be a guide for the perplexed in the theories of industrial relations, whether it be in the public sector or the private sector.¹ His experience over some thirty years in the administration of labour relations legislation has led him to the conviction that there are no eternal verities in this field to which one must adhere lest one face the risk of being guilty of heresy. There is no absolute truth or absolute right in labour relations legislation. There is no decalogue to which one can refer to judge the legality or morality of any course of conduct either by employers or employee organizations. As Holmes J. of the Supreme Court of the United States once said,

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.²

2. One observes the industrial relations scene as if through a kaleidoscope - there are ever-changing forms and hues. Legislation framed to meet conditions today may not be suitable to conditions tomorrow. The lifespan of any comprehensive set of provisions is relatively short - five years, a decade perhaps. The industrial body politic becomes resistant to

old techniques for the resolution of disputes just as infections of the human body became resistant to penicillin and the early sulfa drugs. One must constantly be on the look-out for new procedures, new techniques and new remedies. Periodic adaptation to changes in the mood of the parties and of the public, to changes in public acceptance of certain consequences of action by one party or the other, is the only constant in this area of human relations. In the final analysis, there can be no more than a reconciliation for the time being of conflicting interests of employers, employees, employee organizations and the public. In the course of an endeavour to reconcile such conflicts, one must also take into account the deep-felt needs of each of the parties concerned. History is replete with instances where what appeared to be a logical scheme that could be justified on the basis of some abstract principle failed to achieve its purpose because it did not take into account some conviction or even illusion that had become ingrained in the minds of a section of the citizenry. Those who are responsible for framing amendments to labour relations legislation must always bear this in mind so that their recommendations not only seek to achieve a balance between the interests of the respective parties but also are acceptable in the context of society as it is. The recommendations set out in this report must therefore be read as a whole. It is fair to say that some of them would not have been made, or would have been given a different thrust, had it not been for the fact that they were devised as a counterweight to some other proposal, or if the realities were otherwise than they are.

3. My terms of reference are to report on amendments to the Public Service Staff Relations Act "having regard to the experience gained since

that Act came into force ... in order to meet adequately the needs of the employer and the employees in the Public Service and the employee organizations that represent them, and to serve the interest of the public." To my mind, this language assumes that the basic structure of the legislation is sound. My personal observations, based on almost daily contact with all parties concerned, on the representations that have been made to me over the last several months, on the views expressed to me by interested persons in a series of interviews and on discussions with knowledgeable persons in other jurisdictions, confirm this assumption. The Public Service Staff Relations Act, enacted in 1967, was a daring innovation in regulating employer-employee relations in the public service of a major jurisdiction. One measure of its worth is that no responsible person in Canada has suggested that the legislation be repealed and that the establishment of terms and conditions of employment for public servants be returned to unilateral determination by the employer, as was the case prior to 1967.³ Most of the representations that have been made to me since I was charged with the responsibility of reporting on amendments to the legislation have been in the nature of suggestions for improvement in the scheme to give greater protection to the employees, to the public and to the employer, as the case may be. My starting point, therefore, is that it would be undesirable to recast drastically the framework for regulating employer-employee relations in the Public Service of Canada as set out in the Public Service Staff Relations Act, that I should direct my attention to recommendations, in the very words of the terms of reference, as to how the legislation should be amended or revised in order to meet adequately the needs of the employer and the employees in the Public Service and the employee organizations

that represent them and to serve the interest of the public.

4. In his address to the House of Commons on April 17, 1973,⁴ when he introduced the Bill to amend the Public Service Staff Relations Act, the President of the Privy Council, the Honourable Allan J. MacEachen, said that "it is anticipated that [the] report will be available to the House early in the fall for consideration." This statement indicates a sense of urgency that was also reflected in the remarks on the Bill by the spokesmen for the other political parties. Having regard to this time frame, I came to the conclusion that there were certain matters that would require examination over a lengthy period of time. It therefore became necessary to put these matters aside. Attention is drawn to them at various points throughout the report; some of the problems are identified in cursory fashion. I recommend that appropriate steps be taken to have them examined at an early date in the future.

5. When the Public Service Staff Relations Act was in course of preparation about seven years ago, the labour relations legislation applicable to enterprises under federal jurisdiction had not been amended for about eighteen years. Since 1948, many changes had been made in provincial labour relations legislation to meet changing conditions. For this and other reasons, it was not considered appropriate in the drafting of the Public Service Staff Relations Act to model that Act on the Industrial Relations and Disputes Investigation Act.⁵ Today the situation is otherwise. Part V of the Canada Labour Code⁶ was enacted, after exhaustive study by a parliamentary committee and by Parliament itself, in 1972. While substantial differences between the two federal labour relations statutes will have to

be maintained to accommodate the special characteristics of a national public service, e.g., its size, complexity and the necessity for protecting certain vital services, nevertheless, divergences from the revised Canada Labour Code on matters of substance should only be maintained for good and sufficient reasons.

6. Recommendations for the revision of the Public Service Staff Relations Act must take into account the needs of a Public Service that consists of a great variety of groups, many of which have unique qualities and conditions of work that distinguish them from other public servants. In some situations, a simple solution could be devised to meet the needs of one group, but that solution might play havoc with the interests of other groups and of a reasonably cohesive Public Service. A pattern of collective bargaining legislation that is constructive for the totality of the public service must be one adapted to the conditions of as large a proportion of the employees as possible, while assuring to each group a reasonable opportunity to govern the conditions peculiar to that group. Since legislation must be drafted in general terms, the best that one can hope to achieve is to find the highest factor common to all groups and then to make allowances for deviations but only to an extent that will not destroy the basic principles of the scheme.

7. The report of the Task Force on Labour Relations⁷ states that "Collective Bargaining has yet to be brought to bear on the problems of job dissatisfaction and alienation from work." The Professional Institute of the Public Service of Canada, in its submission to me drew attention to the views of Dr. Abraham Maslow⁸ that satisfaction of ego and self-actualization

needs are among the most significant of the rewards associated with achievement in the case of professionals, scientists and administrators. To overcome worker alienation and to satisfy ego and self-actualization needs of employees are, indeed, highly laudable objectives. However they are objectives that may be attained only by a change in the attitudes of the participants in the employer-employee relationship - all of them - over a long period of time. As the Institute conceded in its submissions, the approach it proposes "cannot be forced on anyone; one cannot legislate good human relations." David L. Cole, a distinguished and eloquent arbitrator, recently put this thought in these words: "... I am convinced you cannot compel people to work in harmony unless they have the urge to do so. We need good will, but we cannot obtain it by decree or by law."⁹ The author of this report must therefore eschew an analysis of the pros and cons of the sociological and psychological theories on which the approach favoured by the Institute is based. He must deal with the here and now.

8. Nothing I have just said is to be taken as suggesting that either the legislation as it stands or the recommendations contained in this report are incompatible with the adoption of programs that would further the human relations objectives the Institute believes should be attained through a perfect or near perfect system of bargaining, whether it be called collective bargaining in the generally accepted sense or some new formulation of the concept of the inter-relationship of employees and management in a democratic society. Collective bargaining, in the conventional sense, is replete with many examples of mature and responsible relationships between employers and bargaining agents. As the late Allan Flanders said:

If one had to select one particular factor ... as having the greatest influence on the style of collective bargaining, it would probably be the level of trust between the parties. Trust is not a euphemism for collusion; a high level of it is quite compatible with tough, vigorous, even ruthless negotiation. It does not necessarily imply any sharing of objectives; only such things as the knowledge, based on experience, that the other party will not practise deliberate deception; that he will stand by his pledged word; that he will show some understanding of your problems and difficulties. Obviously as the level of trust rises the style of negotiation changes. This will show itself in deciding what risks either side is prepared to take in reliance on the other's good faith or in declining to exploit the other party's blunders for the sake of immediate tactical advantage. A greater readiness to compromise on the smaller points and to take a longer and broader view of the larger ones is the practical outcome.¹⁰

9. The effectiveness of any legislative scheme depends in the final analysis on the capabilities of those involved in its administration. In industrial relations, those who must be regarded as being so involved include not only the administrative agency created to implement the legislation but also the employers and the employee organizations concerned. Experience has convinced me that it is unwise to vest in a labour relations board more authority than it can effectively organize itself to exercise at any given time; it is also unwise to impose upon the parties subject to the legislation a burden that they do not have the capacity to bear. Progressive adaptation to new requirements and opportunities advances the interest of all parties much more rapidly than revolutionary change. These considerations have weighed heavily with me in dealing with some of the problems that have come to my attention. To exceed certain limits at this time would only serve to raise expectations in the hearts of employees that could not be realized in practice and would produce a sense of frustration

that would undermine confidence both in the legislation itself and in the institutions that are charged with the duty of furthering and protecting the interest of the employees, the employer and the public in accordance with the provisions of the legislation. These observations lead me to the conclusion that some of the alterations in the legislation, especially those that are extensive in character, should be phased in over a period of time, rather than be brought into effect immediately upon the enactment of the changes.

10. Again, proposals for changes in public service employer-employee relations legislation must also take into account another factor. Before the advent of collective bargaining legislation, terms and conditions of employment were established in the private sector, so far as the law was concerned, according to the will of the employer, be he despotic or benevolent in his outlook. Some terms and conditions of employment for federal public servants in Canada were set by statute enacted by Parliament and not in rules laid down unilaterally by management. Others were made by bodies, such as the Civil Service Commission, which were independent of management. In some instances, either by statute or by custom, representatives of the employees were consulted, in greater or lesser degree, before terms and conditions were made operative. In addition, employees had a number of formal avenues to seek redress for certain of their grievances. It is obvious that the machinery establishing terms and conditions of employment that existed before the coming into force of the Public Service Staff Relations Act did not meet the needs of the situation. Under the plan devised in the middle 60's and embodied in the 1967 legislation - the

Public Service Staff Relations Act, the Public Service Employment Act, and the amendments to the Financial Administration Act - authority was vested in the organizations representing employees to bargain with respect to some terms and conditions of employment applicable to public servants and a mechanism was created for final and binding disposition of some types of grievances. Other areas were left to the Public Service Commission and some matters were left to be determined by the employer. Under this plan, a complex of rules and practices has been established for dealing with some matters that are non-bargainable under the Public Service Staff Relations Act. For the most part, these rules and practices extend throughout the whole of the Public Service and confer upon employees rights and privileges that flow across barriers that would normally be interposed if bargaining were conducted along bargaining unit lines. To make these matters fully bargainable immediately for each bargaining unit would create a system of vested rights for the employees in each unit that it might be difficult to eliminate at a later stage.

11. There appears to be a consensus that, in some areas, service-wide conditions ought to be retained. An attempt should therefore be made to develop a forum for dealing with certain matters, some of which are now bargainable and some of which would become bargainable if the recommendations in this report are accepted. Such a forum could pave the way for further statutory changes that would provide for coalition bargaining.¹¹ This consideration is a further reason for phasing in, over a period of time, some of the alterations in the legislation recommended in this report and, as the report indicates, deferring action at this time on an expansion of the scope of bargaining to include some matters now administered on a

service-wide basis by the Public Service Commission.

12. In the context of the struggle for the establishment of collective bargaining for public servants, the term "consultation" has acquired in some quarters an unsavoury connotation. This attitude should not blind us to what has been accomplished over the years in the federal Public Service through consultation. It is scarcely necessary, when one is dealing with the public service community, to review these accomplishments and to set out at length what the process of consultation has contributed to the development of the skills that have made it possible for the bargaining agents and for the employer to operate with a considerable degree of success under the present legislation. The groundwork that was laid in the 50's and early 60's through consultation gave to most associations the experience they required to cope with a formal collective bargaining apparatus in the later years of the decade on rates of pay and matters related thereto. Consultation enabled the parties to develop their resources in such a manner as to pave the way for eventual collective bargaining on matters vital to their interest.

13. Since the coming into force of the Public Service Staff Relations Act, the consultation process has been continued and refined both with regard to some matters that are subject to bargaining under the legislation and some that are excluded from bargaining. The first group includes, inter alia, conditions or benefits which tend to have service-wide application, or at least where it appears that advancement in conditions and terms should progress uniformly on a broad plane rather than along individual bargaining unit lines. Again, there would appear to have been some matters

where the bargaining agents realized the force that a multi-union approach would have in the evolution of certain conditions.

14. It is against this background that some of the recommendations in this report call for consultation rather than bargaining at this stage on some complex issues that have a service-wide or intergroup impact. In some instances where consultation is the recommended approach to a problem, third-party involvement is provided for to minimize feelings of frustration that have at times in the past been associated with the consultation process. As was pointed out earlier, this report does not assume that the recommendations contained therein will avail for all time. If the recommended consultation process fails to meet the needs of the parties after it has been given a fair trial, they will undoubtedly seek other ways of resolving their differences.

15. It may be well to point out that, since consultation has been recommended in some instances as an alternative to bargaining, it is vital that both parties soberly assess the consequences that might ensue should the consultation process degenerate into a round of repetitious, futile confrontations. One hesitates to emulate Cassandra, but it is probably no exaggeration to say that the orderly and progressive development of our unique collective bargaining system that is being kept under observation with keen interest in many jurisdictions may be placed in jeopardy.

16. One final word of caution. This report is not a vade mecum of employer-employee relations in the federal Public Service. It assumes a broad acquaintance not only with the basic elements, but also with the general operation, of the Public Service Staff Relations Act, the Public

Service Employment Act and the Financial Administration Act. An outline of the provisions of the first of these Acts and of the principles enunciated by the several authorities that function under the Act in their decisions and awards since that Act came into force are to be found in the Annual Reports of the Public Service Staff Relations Board.

FOOTNOTES

1. The term "private sector" is used throughout as a convenient way of referring to general labour relations legislation. The term, so used, is not strictly precise because the so-called private sector legislation in many jurisdictions covers local government, and some of the undertakings covered by the Canada Labour Code cannot be accurately described as "private" because of their governmental links, such as, for example, the Canadian Broadcasting Corporation, Air Canada and the Central Mortgage and Housing Corporation.
2. Hudson County Water Co. v. McCarter, (1908) 209 U.S. 349 at p. 355.
3. It should be noted that even before 1967 there was a certain measure of consultation by the employer with employee organizations on terms and conditions of employment.
4. House of Commons Debates, 1st Session, 29th Parliament, Vol. 117, No. 74, 3377.
5. S.C. 1948, c. 54.
6. S.C. 1972, c. 18.
7. Canadian Industrial Relations, The Report of the Task Force on Labour Relations, The Queen's Printer, Ottawa, 1969 (popularly known as the Woods Report), p. 94.
8. The Institute's source, according to the footnote in its brief, was Frank Goble: The Third Force: The Psychology of Abraham Maslow, A Revolutionary New View of Man.
9. Monthly Labour Review, September 1973, p. 39.
10. "Measured Daywork and Collective Bargaining," (1973) 11 British Journal of Industrial Relations, p. 368 at p. 371.
11. See, in this connection, Chapter 6, paragraph 329.

Chapter 2

OBSERVATIONS REGARDING CLASSES OF PERSONS TO WHOM THE LEGISLATION APPLIES

17. The collective bargaining provisions of the Public Service Staff Relations Act govern the relationship between the employer and all persons employed in the Public Service¹ with certain specified exceptions.² Representations have come from many quarters that additional persons should either be included or excluded.

18. Administrative and foreign service officers and professional and scientific personnel: My attention has been drawn to a recommendation in the report of the Advisory Group on Executive Compensation, of January 13, 1971, that "all administrative and foreign service officers and ... professional and scientific personnel, as well as ... some senior grades in the technical area" should be excluded from the collective bargaining provisions of the legislation. This proposal of the Advisory Group not only discloses a distrust of the collective bargaining process that I do not share but it also flies in the face of developments that are taking place in this country and in many other jurisdictions.

19. Many of the types of employees whose positions have been classified under the Public Service Staff Relations Act as falling into occupational groups in the professional and scientific category have been entitled to participate in collective bargaining under the protection of the general labour relations legislation in Ontario since 1943 and in most of the rest of Canada since 1944.³ Indeed, under the 1943 Ontario Collective Bargaining Act⁴ and under the Wartime Labour Relations Regulations, P.C. 1003 of February 17, 1944, and provincial legislation making the

Regulations applicable to provincial enterprises, and under the Saskatchewan Trade Union Act of 1944,⁵ even members of the so-called licensed professions were entitled to form unions and engage in collective bargaining under statutory authority, and I have a clear recollection that professional engineers availed themselves of these rights in a number of instances. In the province of Quebec in 1944 persons belonging to a number of specified professions were excluded from the ambit of the Quebec Labour Relations Act.⁶ Then, in 1948, following the lead of the federal Parliament, which exempted from the Industrial Relations and Disputes Investigation Act⁷ members of the medical, dental, architectural, engineering or legal professions qualified to practise under the laws of a province and employed in that capacity, most other jurisdictions in Canada excluded from collective bargaining legislation some of what are referred to as "licensed" professions.

20. In 1964 the Quebec Labour Code⁸ extended bargaining rights to "professionals". A few years later, in 1968, the Task Force on Labour Relations⁹ recommended that "the coverage of collective bargaining legislation be extended to employees who are members of licensed professions ..., " a recommendation that was endorsed by Parliament when it enacted Part V of the Canada Labour Code¹⁰ in July 1972. It would scarcely be appropriate for me to recommend that the privilege of collective bargaining accorded to all professional employees in the private sector who fall within federal jurisdiction should be denied to such persons en bloc simply because they happen to be employed in the Public Service.

21. It has been suggested that some professional employees are

disenchanted with collective bargaining and find it difficult to reconcile collective bargaining with their professional status. If this is indeed the case, the remedy lies in their own hands. There is nothing to prevent professional employees in any bargaining unit from applying to the Public Service Staff Relations Board for revocation of the certificate issued to the employee organization that now represents them. If a majority of the employees in any bargaining unit wish to "liberate" themselves from what they feel to be oppressive or unsuitable legislation, they are free to do so and to conduct their affairs in a fashion other than that provided for under the Public Service Staff Relations Act. The only restriction on their freedom that would then remain would be that they would not have the right to strike, a "right" which, it is probable, many of them do not prize highly in any event.

22. Supervisory personnel: Since the repeal of the Ontario Collective Bargaining Act,¹¹ none of the labour relations statutes in Canada has expressly excluded persons solely on the ground that they exercised supervisory authority over other employees. The Wartime Labour Relations Regulations¹² excluded persons having authority to employ or discharge employees, but no such express exclusion is to be found in the Industrial Relations and Disputes Investigation Act of 1948.¹³ Nevertheless, the exercise of supervisory authority has been among the factors that have been considered by labour relations boards in determining whether a person should be excluded from the operation of such legislation on the ground that he exercised management functions.

23. The Task Force on Labour Relations¹⁴ recommended that the

statutory right of collective bargaining be extended to supervisory and junior managerial employees. Parliament did not see fit to accept this recommendation in toto, but it did accept that part of the recommendation which related to "employees whose duties include the supervision of other employees."¹⁵ In so far as supervisory employees are concerned, then, the coverage of the Canada Labour Code may be regarded as identical with that of the Public Service Staff Relations Act. As in the case of professional employees, it would scarcely be appropriate for me to recommend that the privilege of collective bargaining accorded to supervisory employees under the Canada Labour Code should be denied to such persons simply because they happen to be employed in the Public Service.

24. It may not be amiss to draw attention to the history of collective bargaining with regard to supervisory employees under the Public Service Staff Relations Act over the last six years. Subsection 26(4) of the Public Service Staff Relations Act empowered the Public Service Staff Relations Board to determine in certification proceedings that supervisory employees constituted a unit separate from non-supervisory employees in any occupational group. In the central administration, the employer sought severance of supervisors from non-supervisors only for employees in the operational category. Two certificates - one for supervisors and one for non-supervisors - were issued for the same bargaining agent for each of eight of the occupational groups in the operational category. No such severance was proposed by the employer in applications with regard to occupational groups in the scientific and professional, technical, administrative and foreign service, and administrative support

categories. During the first round of bargaining in those instances in which an occupational group was divided into two units and where they were represented by the same bargaining agent, negotiations for both units were conducted at the same time and two separate, but almost similar, collective agreements were concluded. In the second round of bargaining relating to these eight occupational groups, only one agreement was entered into for the employees in each occupational group, i.e., both units in each occupational group were joined in the one agreement; the only indication that two distinct units were involved is to be found in the definition section of the respective agreements which identifies the two units. In the third round of bargaining there has been a return in several, but not in all cases, to the original practice of having two separate agreements, but still almost identical in their terms.¹⁶

25. Persons employed in a managerial or confidential capacity: For an understanding of the problems that have to be dealt with in attempting to determine what persons should be excluded from bargaining on the ground that they exercise "managerial" functions, it may be well to start by quoting the definition of the term "person employed in a managerial or confidential capacity" as it appears in the Public Service Staff Relations Act. The definition is as follows:

"person employed in a managerial or confidential capacity", means any person who

- (a) is employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service, or
 - (b) is employed as a legal officer in the Department of Justice,
- and includes any other person employed in the Public

Service who in connection with an application for certification of a bargaining agent for a bargaining unit is designated by the Board, or who in any case where a bargaining agent for a bargaining unit has been certified by the Board is designated in prescribed manner by the employer, or by the Board on objection thereto by the bargaining agent, to be a person

- (c) who has executive duties and responsibilities in relation to the development and administration of government programs,
- (d) whose duties include those of a personnel administrator or who has duties that cause him to be directly involved in the process of collective bargaining on behalf of the employer,
- (e) who is required by reason of his duties and responsibilities to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act,
- (f) who is employed in a position confidential to any person described in paragraph (b), (c), (d) or (e), or
- (g) who is not otherwise described in paragraph (c), (d), (e) or (f), but who in the opinion of the Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

Two aspects of the definition call for attention. One is procedural and the other relates to the particularization of the characteristics of the persons comprehended within the definition.

26. (a) The procedural problem is delineated in the reasons for decision of the Public Service Staff Relations Board in the Government Policy on Rights of Managers Case No. 2,¹⁸

The legislative scheme for ascertaining which persons are employed in a managerial or confidential capacity provided under the Public Service Staff Relations Act differs from the legislative scheme provided for such purpose under labour relations legislation applicable elsewhere in Canada. Under the latter type of legislation, the statute usually contains a definition as to what constitutes a managerial or confidential position or function or it leaves to the respective labour relations boards authority to make a determination as

to whether a certain person exercises managerial or confidential functions or there may be a combination of both approaches. In essence, however, the process is usually one in which the employer, having assigned to a person duties which the employer regards as having a managerial or confidential quality, advises the union concerned of the fact and the union, if it takes exception to the claim of the employer, launches a proceeding in which it asks the labour relations board to make a determination as to whether the claim of the employer is or is not valid. The determination is in the form of a finding as to whether, having regard to the duties performed by the person whose status is in issue, that person is a person employed in a managerial or confidential capacity. Under the Public Service Staff Relations Act ... where the claim of the employer is that a person is engaged in certain duties that bring him within heads (iii) to (vii) of section 2(u) and objection thereto is made by the bargaining agent ... paragraph (u)¹⁸ says that the Board may designate such a person to be a person who performs certain described duties. It is only after the Board has made such a finding that the person is deemed to be a "person employed in a managerial or confidential capacity".

27. Some of the consequences that flow from the formula incorporated in the Public Service Staff Relations Act for identifying persons employed in a managerial or confidential capacity were spelled out by the Board in the foregoing decision.

This situation is an awkward one indeed for the employer, bargaining agents and the individuals who are placed in this peculiar position. The Employer faces the dilemma of having some members of what it regards as its management team treated as members of the bargaining unit entitled to all the rights that accrue to them by reason of that fact. The individual is placed in a position where there may be a conflict between his duty to his employer and his interest in, and perhaps even his duty to, the bargaining agent. The bargaining agent may find its interests or those of its members imperilled by conduct that would be prohibited by Section 8 if the individual whose status is at the core of this discussion were a member

of management.

28. There are also several other consequences that should be mentioned. The legislation as it stands makes it tempting for a bargaining agent to object to the claim of the employer that a certain person is employed in a managerial or confidential capacity; delay in final disposition of the issue favours the bargaining agent. Whether any of the bargaining agents has yielded to the temptation is beside the point; human nature being what it is, it is likely that this has in fact occurred on some occasions. What is far more serious from the point of view of a sound employer-employee relationship is that the employer believes that bargaining agents have objected for selfish reasons to proposals for designation in some cases. The elimination of such suspicion is highly desirable. In addition, although it is impossible to delve into the minds of Board members, there is room for suspicion that in some decisions dealing with the issue here under consideration members have been influenced to some extent by the procedural problem. A person may be exercising managerial functions at infrequent intervals; say he is replacing a managerial type when the latter is absent on vacation or because of illness. In the private sector, the replacement is treated as having a managerial status only while performing the duties of the person he replaces and is treated as an employee at other times. Because of the delays inherent in the existing system, it is not unlikely that more weight may have been given to infrequent exercise of management functions than would be the case in the administration of the general labour relations legislation.

29. One solution for this problem would be that, when the employer

assigns duties to a person which, in the view of the employer, bring that person within the class of persons "employed in a managerial or confidential capacity" as that phrase is defined in the legislation, he should thereupon, as a matter of principle, be treated as having been so identified.²⁰ In exploratory talks with some of the bargaining agents concerning a recommendation being made along the lines set out above, it was evident that they were greatly concerned that such a recommendation might open the door to wholesale identification by the employer of persons as being part of a management team. If the claims of the employer were ultimately rejected by the Board, the employer would suffer only minimal inconvenience, whereas bargaining agents could be seriously weakened in their capacity to carry out their responsibilities under the Act. Indeed the position of some of the bargaining agents could become critical. The percentage of persons excluded from bargaining units as being persons employed in a managerial or confidential capacity in the central administration is much higher than some of the bargaining agents anticipated would be the case. In 1967, the Honourable E.J. Benson, then President of the Treasury Board, had mentioned a figure of 5%.²¹ In employee groups brought into bargaining in the first three years, the average percentage of persons designated was about 6.5²² of the number of persons in the occupational groups concerned. The best estimate I can obtain as to what the overall situation is at the present time is that the percentage stands at about 7.6. The distribution of designated employees in the five occupational categories is now approximately as follows:

Operational Category	.4
Technical Category	2.5
Scientific and Professional Category	11.5
Administrative Support Category	12.8
Administrative and Foreign Service Category	20.5

The figures can also be looked at from the point of view of their impact on the bargaining agents. In the foreign affairs occupational group, the employees in which are represented by the Professional Association of Foreign Service Officers, over 25% have been designated. Of the occupational groups for which the Professional Institute of the Public Service of Canada is the bargaining agent, over 11.5% have been designated. In the case of the Public Service Alliance of Canada, about 9.5% have been designated.

30. One need not impute improper motives to the employer; there may be, and probably are, good reasons for the employer's proposals on designation. The "evidence" would indicate that over the years since the Act came into force there has been a change of attitude on the part of the employer as to what persons are to constitute the management team. There may be justification for this change of attitude. But it is obvious that the apprehensions of the bargaining agents as to what may be in store for them if the procedure regarding identification of managerial types is altered is not a figment of their imagination. We are faced then with a situation in which, on one hand, the existing procedure is unduly burdensome to the employer and, on the other, the solution suggested above would engender fear in the minds of bargaining agents that its adoption would be seriously detrimental to

their welfare. To meet the respective concerns of the parties, it is recommended that the suggestion made in paragraph 29 be adopted but that it be phased in over a period of time sufficient to permit an orderly adjustment to the new approach and that it be made subject to certain conditions that would safeguard the interests of the bargaining agents.

31. It is recommended that the definitions and procedures presently embodied in the legislation remain in effect for each bargaining unit for a period of one year from the coming into force of the revised legislation, this period being subject to abridgment or extension by consent of the parties or by direction of the Board in the circumstances indicated in paragraph 32. The employer should be required to serve upon the bargaining agent for each bargaining unit and upon the Board, within three months of the coming into force of the legislation, a profile of the management team it proposes to identify, in accordance with the revised definition of the term "person employed in a managerial or confidential capacity" set out in paragraph 52, that consists of members of the occupational group concerned. Although this requirement may at first sight appear to be an onerous one, it should be noted that the time limit is not unduly short, since the legislation is unlikely to be proclaimed for some months after it is approved by Parliament. The Board should be authorized to extend the time for the new procedure to become applicable to a particular bargaining unit if the employer is unable to produce the required profile for that unit within the three-month period. The employer and the bargaining agent concerned should be required to meet within one month after the service of the profile, or such longer period as the parties may agree upon, and endeavour to reach agreement regarding

the persons to be identified. Officers of the Board should be made available to the parties to assist them in their endeavours, if they so desire.

32. If the parties reach agreement, the new procedure and the new definitions would become applicable to the bargaining unit to which the agreement relates upon written notice to the Board. If, by the end of the one-year period there remains a significant area of disagreement as to identification of management or confidential personnel as it pertains to any bargaining unit, the Board should be vested with discretion to postpone the date for the introduction of the new procedure and the new definitions for that unit until it has rendered a decision on the employer's proposals for identification. In exercising its discretion, the Board would take into account the extent to which "responsibility" for the failure to reach agreement as to the profile could be attributed to one or other of the parties. It is contemplated that, at least one member of the Board, as reconstituted in line with recommendations set out in Chapter 7, would be assigned primary responsibility to oversee and deal with problems that might arise under this procedure during the phasing-in period. One step that might assist the parties in reaching an acceptable understanding during the phasing-in period would be for the employer to consult with the bargaining agents concerning any instructions that might be issued by the employer to the various departments and agencies as to the manner in which the new definitions are to be applied. The best intentions of the Treasury Board and other senior arms of management may be set at naught by faulty administration at the operational level. A cooperative effort to overcome misconceptions at that

level would serve to reduce tensions that might otherwise develop.

33. After the conclusion of the phasing-in period, it is recommended that the identification process should be as follows: The employer would be required to give notice to the bargaining agent that it has assigned to a person duties and responsibilities that warrant the employer identifying the person as a member of management. However, such assignment of duties shall not have the effect of causing the person concerned to be treated as coming within the managerial or confidential class until two months after such notification, except (i) with the consent of the bargaining agent, or (ii) where a person is assigned as a replacement to perform the same duties as a person who had previously been identified. The bargaining agent must be entitled to object to the proposed identification of the person and authority would be vested in the Board to make a final disposition of the matter in case of objection. Where a person who has been identified as being employed in a managerial or confidential capacity ceases to be so employed, the employer would be required to notify the bargaining agent forthwith to that effect and that person would thereupon be deemed to be included in the appropriate bargaining unit.

34. Theoretically, the possibility no doubt remains that the employer might deliberately refrain from revealing a complete picture of its intentions in the profile it presents to a bargaining agent during the phasing-in period and then, after that period has come to an end, identify a large number of additional persons. If the employer were to act in this fashion, it would be acting in bad faith. I cannot bring myself to believe that such a state of affairs would come to pass. Indeed, it would be highly improper for me to base my recommendations on the assumption that,

if the recommendations were incorporated in legislation, either of the parties would seek to circumvent the intent of the legislation in an unprincipled manner.

35. Persons identified as being employed in a managerial or confidential capacity are not entitled to strike. Under the plan set forth in the recommendations here under consideration, it would be possible for the employer to identify persons as part of the management team at a time when a strike is impending and the bargaining agent concerned might have a real fear that the employer may identify persons for purposes other than that they are truly part of the management team. To remove the likelihood of such a course being adopted by the employer, I recommend that, after a request for the establishment of a conciliation board has been filed with the Chairman of the Public Service Staff Relations Board and until a new collective agreement has been entered into, the employer should not be entitled without the consent of the Board to identify persons as being employed in a managerial or confidential capacity. There should be an exception to this limitation in the case of persons assigned to replace, temporarily or on a continuing basis, persons who have previously been identified.

36. The Treasury Board Secretariat has proposed that a burden of proof, in connection with objections to the identification of managerial or confidential personnel, should be cast on the bargaining agent to demonstrate that the duties assigned are not of such a nature as to justify exemption. I cannot agree. Knowledge of all the circumstances in such a situation is primarily in the possession of the employer and the employer should be required to provide the evidence to support its

claim. The extent of such evidence would of course depend on the facts of the particular case and the burden of adducing evidence may well shift from one side to the other at various stages in the proceeding.

37. If the foregoing recommendation is adopted, the employer might cease checking off from the salary of a person, identified by the employer as being employed in a managerial or confidential capacity, dues required to be checked off and paid to the bargaining agent under the terms of a collective agreement or under the provisions of a recommendation regarding voluntary revocable check-off set out in Chapter 6. If the position taken by the employer with respect to the status of such a person were not upheld by the Board, a heavy financial burden would then be cast on the employee, since the employer would be required subsequently to deduct from the salary of the employee the amount of the dues that accumulated over some period. It is therefore recommended that, if the employer's claim is upset, the employer should, at periodic intervals, make a payment to the bargaining agent in lieu of the dues that should have been checked off.

38. (b) I turn now to deal with the characteristics of the persons to be comprehended within the definition of the phrase "person employed in a managerial or confidential capacity." It is generally recognized that it is essential to identify an adequate and credible management team to carry out the functions of the employer under a regime of collective bargaining. The members of this team must be persons whose primary duty in carrying out these functions is to look after the employer's interest. The view one hears from time to time that all public servants constitute one happy family and that there really is no

possibility of conflict between their responsibilities to the employer and their loyalty to an employee organization cannot stand up under serious scrutiny. "Conflicts of interest are inevitable in all societies."²³ The question is not whether an employee will reveal to a bargaining agent confidential information that may come to him in the performance of his duties; his oath of secrecy should afford protection against such a breach of confidence. But the oath of secrecy cannot give the employer assurance that a person can successfully separate in his own mind his personal interests from his responsibilities to the employer in assessing a situation in which he is required to make recommendations on policy or programs and so on, or to take action to carry them into effect. The problem is one of drawing the line between persons whose loyalties to their fellow employees and to their bargaining agent may be tolerated and even encouraged without doing harm to the system and those who must devote themselves exclusively to furthering their employer's interest. It is exceedingly difficult to determine where the line should be drawn and to support one's conclusion by absolute logical reasoning.²⁴ Historical perspectives, prevailing practices, a degree of expediency - all must be given due weight.

39. It should be noted at the very outset that, in their representations to me, both the bargaining agents and the employer have engaged in what might be called a numbers game; they drew attention to the proportion of persons in the various occupational groups who had been identified as managerial or confidential. The Treasury Board Secretariat suggested that the proportion was low when compared with the situation in the private sector. The bargaining agents maintained that the

assurance they claimed had been given them in 1967 by the Honourable E.J. Benson had not been kept. The figures, standing by themselves, have little significance. No statistical documentation was provided to me as to what is actually the situation in the private sector. In any event, such statistics, even if they had been available, would probably fail to take into account the fact that, under the Public Service Staff Relations Act, supervisors are included in the coverage of the Act. Many persons performing supervisory functions have been excluded in the private sector under the general provision of the legislation in most jurisdictions relating to persons employed in a managerial capacity. Indeed supervisors have been expressly brought within bargaining under the provisions of the Canada Labour Code²⁵ only within the last year.²⁶ On the other hand, the employer ought not to be tied to the statement made by Mr. Benson if the percentage mentioned by him destroys the capacity of the employer to build an adequately staffed management team and to provide adequate support underlay for management. It should be noted that Mr. Benson, in his statement, indicated that it was impossible at that time to forecast exactly what proportion of persons would be excluded. The true situation obviously could not be gauged at the moment of the introduction of a new scheme of employer-employee relations that was so innovative and where forecasts of what would occur in the future could be based only on speculation and not on experience. Indeed, because of the very nature of the demands placed on the employer by the collective bargaining regime, it has had to increase its complement of managerial employees.²⁷

40. Most labour relations acts in Canada exclude what might be referred to for convenience as managerial types from the collective

bargaining provisions of the legislation in very general terms. Little in the way of bench marks are set out in the legislation, wide discretion to determine who should be excluded being left in the hands of the several labour relations boards. As the definition quoted in paragraph 25 indicates, the Public Service Staff Relations Act attempted to provide for the Public Service Staff Relations Board detailed criteria under seven heads. Both the Treasury Board Secretariat and the bargaining agents have indicated their dissatisfaction with these criteria.

41. The Treasury Board Secretariat seems to be of the opinion that the managerial and confidential clause of the Public Service Staff Relations Act is more restrictive in its definition and application than are similar clauses in the general legislation. I am by no means convinced that this view is fully supported by the facts. In so far as the "confidential" exclusion is concerned, the Canada Labour Code²⁸ now confines that exclusion to persons employed in a confidential capacity in matters relating to labour relations. The same is true of practically all labour relations statutes in Canada. The present provisions of the Public Service Staff Relations Act exclude some persons under the "confidential" head who have no immediate or demonstrable involvement in labour relations. As for the managerial exclusion, my reading of the jurisprudence developed by the various labour relations boards in Canada under the legislation they administer, and especially in cases concerning local government, leads me to the conclusion that, while in some instances there might be bench mark duties that would warrant exclusion under the private sector legislation but the performance of which in the Public Service would not be considered by the Board as supporting a claim to designation,

nevertheless, by and large, the applicable criteria in the two sectors, where those affected have comparable duties and responsibilities, have not produced any startling differences in results.

42. I do believe, however, that what has happened under the Public Service Staff Relations Act as it stands, for a variety of reasons has contributed to a situation in which, on the one hand, the employer has not been able in every circumstance to identify adequately what might be described as a proper and credible management team and, on the other hand, the bargaining agents have been left with the impression that the employer has sought from time to time to exclude persons for reasons that appear to them to be insubstantial. Thus, for example, a large number of persons have been identified as coming within head (e) of the definition; i.e., persons required by reason of their duties and responsibilities to deal formally on behalf of the employer with grievances presented in accordance with the grievance procedure provided for by the Act. In many instances such persons are also entrusted with other management functions; but an objection by the bargaining agent to the identification of such a person as being employed in a managerial or confidential capacity can be more easily disposed of by showing that he plays a role in the grievance process than it is to show that he should be identified as management because of the other functions he performs. The resort to the easier route for identification, a course to which it should be stated the Board has contributed in substantial measure, has led to a distorted assessment of the real basis for the identification of persons as being members of the management team. In addition, as was pointed out in paragraph 28, a tendency may have developed for the Board to designate outright persons

whose performance of management functions may be intermittent or infrequent. I am confident that a great deal of the dissatisfaction that has been engendered by what occurred in this regard under the legislation as it stands will be eliminated by the procedure recommended under this head of the report.

43. As to the definition itself, two alternative approaches come to mind. The legislation could simply declare that persons employed in a managerial or confidential capacity be excluded from the collective bargaining provisions of the Act and leave it to the Board to establish the perimeters of the definition on a case by case basis, or it could spell out the appropriate criteria in considerable detail with whatever modification is necessary in the language that now defines the class. To my mind, the first alternative does not provide a satisfactory solution. The situation might have been otherwise if the statute had originally adopted the private sector approach. To abandon completely the present formulation of the relevant clause in the definition would throw into confusion all that has been done with regard to managerial exclusions up to the present time. The parties, as well as the Board, even as reconstituted under the recommendations contained in Chapter 7 of this report, would lack the resources to deal with the situation in anything approaching a satisfactory manner. In my opinion, it is therefore preferable to examine the language of the clause as it now appears in the definition section of the Act to ascertain how, if at all, it should be altered or modified.

44. Two of the classes of persons who now fall within the managerial or confidential "definition" may be disposed of briefly. The

first comprises persons employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court, the deputy head of a department or the chief executive officer of any other portion of the Public Service. There has been no suggestion from anyone that the "status" of any of these persons should be altered. The second group consists of persons employed as legal officers in the Department of Justice. The Professional Institute of the Public Service of Canada contended that many of the legal officers in the Department of Justice do not have duties the exercise of which can lead in the slightest degree to a conflict between their duties and responsibilities to the employer and their interest in the collective bargaining process. Many of them, they say, are completely removed from any activity in, or advice related to, any aspect of employer-employee relations. To my mind the situation is one that calls for careful and exhaustive examination before any change is made in the legislation. At the risk of being accused of being unduly influenced by the predilections of the profession of which I am a member, I must say that I am extremely hesitant to make, and I refrain from making, a recommendation that the present "exclusion" with regard to legal officers be altered on the basis of the general statements that have been made to me by the officers of the Institute, statements which unfortunately time does not permit me to investigate adequately.

45. The management team, as I envisage it in the Public Service, consists of both staff and line personnel and some who have a combination of both functions. In relation to staff or policy functions, the management team, generally speaking, ought to comprise those persons in the

organizational hierarchy who are performing staff work on governmental policies and programs at a senior level. The likelihood of there being a conflict between duty and interest for junior and intermediate employees performing staff work is usually remote. A distinction has to be drawn between those who determine a policy or program or control it and those who merely implement a predetermined policy; between those who exercise independent discretion to formulate a policy or program or set necessary guidelines for others to follow and those who use independent discretion but in a predetermined circumscribed area; between those who decide to implement recommendations and those who merely recommend a course of action. It is recommended that these concepts of staff management be embodied in the legislation by excluding from the collective bargaining provisions of the Act persons who regularly participate in a significant degree in the development and determination of government policies or programs.

46. Persons exercising significant decision-making authority in a collective bargaining process are properly identifiable as management. It is recommended that the "managerial exclusion" should therefore apply to (a) persons authorized by the employer to exercise a significant measure of control over employees, as well as (b) persons directly involved on behalf of the employer (i) in the processes of collective bargaining or consultation prescribed by the Act, or (ii) in the exercise of discretion, which is not of a routine or clerical nature, in the administration of a collective agreement or the provisions of a statute, or a regulation, by-law, direction or other instrument prescribing terms and conditions of employment. The reference to the process of consultation

- there is no similar reference in the existing definition - is made necessary by recommendations in this report for consultation being conducted on various aspects of employer-employee relations. The exclusions dealt with in this paragraph would cover inter alia such persons as departmental classification officers, compensation officers, manpower planners and staff relations officers.

47. To overcome an awkward situation that may develop, where the superior to whom an "excluded person" may be accountable may not himself be "excluded", it is recommended that an appropriate clause be added to the term "person employed in a managerial or confidential capacity" to deal with such superiors, if their "supervisory" authority over excluded persons is in respect of duties that led to the identification of the "subordinate".

48. The present legislation excludes from bargaining units persons whose duties include those of a personnel administrator or who have duties that cause them to be directly involved in the process of collective bargaining on behalf of the employer. The substance of the latter portion of this subparagraph has already been incorporated in the recommendation contained in paragraph 46 of this report. That part of the definition that deals with persons whose duties include those of a personnel administrator is imprecise and may exclude some persons who are not exercising authority on behalf of the employer. It is therefore desirable to delete the reference to personnel administrators and supply more certain language to describe those who should be excluded. The Treasury Board Secretariat acts as "the headquarters management unit" of the central administration. With very few exceptions, bargaining agents

have raised no objection to the designation under the present legislation of the members of the staff of the Treasury Board Secretariat. I have no reason to believe that the situation would change if the recommendations made in this report concerning the definition of identifiable persons were adopted. Nevertheless, since it is proposed to drop from the definition the term "personnel administrator", it is desirable to make it clear in the legislation that what has so far been the practice with respect to the staff of the Treasury Board Secretariat is continued. Accordingly, it is recommended, subject to what is said below, that the officers and employees on the payroll of the Treasury Board as presently organized be expressly listed as a class of persons employed in a managerial or confidential capacity. If the employees engaged in the operational portion of the administration of the various superannuations Acts listed in subsection 5(2) of the Financial Administration Act, now located in the Department of Supply and Services, were at any time in the future to be transferred to the Treasury Board, it is not intended that such employees should be subject to being identified solely because they become officers or employees of the Treasury Board. There is at this time located in the Treasury Board an internal administrative services branch, a unique service unit that also provides administrative support to the Department of Finance. It is not intended that the members of this unit should be identified as management personnel solely by reason of their being on the payroll of the Treasury Board.

49. Many members of the staff of the Public Service Commission are presently "excluded" as persons whose duties include those of a personnel administrator. Since it is proposed to delete from the

definition any reference to personnel administrators, and since some of the members of the staff of the Public Service Commission might not be identifiable under the recommendations with regard to other portions of the definition, it is necessary to make special provision for the Commission. It is recommended that persons directly involved on behalf of the Commission in a formal process of (a) consultation, or (b) redress, both prescribed by or under the Public Service Employment Act, be treated as "managerial exclusions."

50. The language of the present definition regarding persons employed in a confidential position is out of line with a realistic and mature approach to employer-employee relations. Quite a number of support staff are excluded because they provide intermittent support to a person who is excluded under another head of the definition. It is therefore recommended that a person engaged in confidential duties be excluded only if he is so engaged under the exclusive direction and control of a person or persons excluded under another head and that this exclusionary provision should not apply to a person in a support capacity whose confidential duties relate solely to the processing of grievances at the first level in the grievance procedure established under the Act. It is not intended that a person performing confidential duties under the exclusive direction and control of an excluded person or persons should be treated as "losing" that status simply by being assigned on a casual basis from time to time by his superior to perform some duties for a non-identified person.

51. Subparagraph (g) of the present definition of the term under consideration in this portion of the report reads as follows:

who is not otherwise described in paragraph (c), (d), (e) or (f), but who in the opinion of the Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer ...

It is a troublesome provision. It has been argued that, if any of the duties of a person whose status is in question before the Board come within any other head of the definition, the Board has no jurisdiction to hold that he should not be included in the bargaining unit. In cases that have come before the Board, it is evident that some persons whose designation was proposed under this subparagraph are engaged in a complex of duties, some of which come under other subparagraphs and some do not. In addition, subparagraph (g) does not set out any measurable managerial criteria for the Board to apply in determining whether a person should be designated. It is therefore recommended that the definition of the term "person employed in a managerial or confidential capacity" should include "any other persons who, in the opinion of the Board, should not be included in a bargaining unit by reason of a conflict between his duties and responsibilities to the employer and any interest he may have as a member of a bargaining unit."

52. The complexity of the problem dealt with in this section of the report makes it desirable that the recommendations as to the characteristics to be included in the definition of managerial and confidential personnel be summarized in such a way that the parties of interest could more readily appreciate their application and impact. With that end in view, it is recommended that the definition be somewhat along the following lines:

"person employed in a managerial or confidential

capacity" means any person who

- (a) is employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service,
 - (b) is employed as a legal officer in the Department of Justice,
 - (c) is an officer or employee on the payroll of the Treasury Board as presently organized (appropriate language should be added to exclude from this subparagraph the internal administrative services branch),
 - (d) is directly involved on behalf of the Public Service Commission in a formal process of
 - (i) consultation, or
 - (ii) redressprescribed by or under the Public Service Employment Act,
 - (e) regularly participates in a significant degree in the formulation and determination of government policies and programs,
 - (f) is authorized by the employer to exercise a significant measure of control over employees,
 - (g) is directly involved on behalf of the employer
 - (i) in the processes of collective bargaining or consultation prescribed by this Act, or
 - (ii) in the exercise of discretion which is not of a routine or clerical nature in the administration of a collective agreement, or the provisions of a statute, or a regulation, by-law, direction or other instrument prescribing terms and conditions of employment,
 - (h) is a person to whom the persons identified in subparagraph (c), (d), (e), (f), or (g) are directly accountable in respect of the duties described in such subparagraphs, or
 - (i) is engaged in confidential duties under the exclusive direction and control of a person or persons identified in subparagraphs (b), (c), (d), (e), (f), (g) or (h), other than a person in a support capacity whose confidential duties relate solely to the processing of grievances at the first level in the grievance procedure established under this Act,
- and includes any other person who, in the opinion of the Board, should not be included in a bargaining unit by reason of a conflict between his duties and

responsibilities to the employer and any interest he might have as a member of a bargaining unit.

53. In its representations to me the Treasury Board Secretariat stressed the importance it attached to the establishment and maintenance of a team of persons who would be loyal to its interests and competent in defending them in the adversary relationships which are an essential characteristic of collective bargaining. To date there is little formal recognition of the special importance which attaches to the responsibilities of persons identified as being employed in a managerial or confidential capacity. One of the few "marks of distinction" is that excluded persons may participate in a management insurance plan; however, persons who cease to be excluded may, on return to a bargaining unit, continue to participate in that plan. Excluded persons whose classification corresponds to that of employees included in a bargaining unit receive identical rates of pay and these rates are determined, for all practical purposes, for excluded persons as well as other employees in the bargaining process. This is clearly not an ideal way to determine compensation for excluded persons. A different and more appropriate compensation method should be devised for such persons that would recognize their distinct responsibilities, although it must be acknowledged that this is not something that can be easily accomplished.

54. Casuals: At the present time, "a person employed on a casual or temporary basis, unless he has been so employed for a period of six months or more" is excluded from the operation of the Act. The adjectives "casual" and "temporary" are not defined anywhere in the Act. There is no reference to employees of this type in the Public Service

Employment Act; that Act speaks of appointments for an indeterminate period or a specified period. The Public Service Terms and Conditions of Employment Regulations made under the authority of the Financial Administration Act advance our understanding only to a very slight extent. In these regulations, "casual" employee is defined as meaning "an employee engaged on a casual basis or for a temporary period not exceeding 12 months." As one of the groups interviewed put it "The application of these various definitions in the collective bargaining system has created some confusion." Not only is there confusion in ascertaining who is a person employed on a casual or temporary basis, but the practice, lawful though it may be, of some departments and agencies in regard to the appointment of casuals also may leave something to be desired, a fact of which the Treasury Board has been cognizant for some time. In a circular dated May 28, 1969, addressed to Directors of Personnel, the Treasury Board declared:

It is obvious that past practices relating to casual employment are clearly incompatible with the system of collective bargaining. This is especially true regarding the former practice of breaking employment periodically for establishment or other such controls, and re-engaging the same persons on the same duties a few days later. Such practices, of course, are not only inappropriate under collective bargaining, but they are also irrelevant having in mind revised policies relating to establishment control. Henceforth the underlying principle must be that a person employed on a casual or temporary basis should be permitted to acquire the status of an "employee" under the relevant collective agreement, provided there is a continuing requirement for his services. Departments are asked to take the necessary steps to ensure that this principle is followed.

With a view to eliminating some of the objectionable practices, the Treasury Board directed as follows:

... where a person is employed on a casual or temporary basis and within a period of six months his employment has not been interrupted for a period of more than five working days at any one time, he shall be accorded the terms and conditions of employment of the applicable collective agreement. If such a person ceases to be employed for more than five working days, it follows that on re-employment as a casual he will not be entitled to the terms and conditions provided by the agreement until he has completed six months of employment with no break within that period in excess of five working days.

A person employed on a casual or temporary basis who has become subject to the terms and conditions of a collective agreement, and who ceases to be an employee and again becomes employed on a casual or temporary basis within a period of three months, will continue to be covered by the provisions of the applicable agreement.

55. Information on the number of persons employed in the Public Service on a casual or temporary basis is not easy to obtain.²⁹ Conditions favourable to the employment of casuals were significantly increased when the Treasury Board shifted from its traditional establishment control mechanisms, i.e., from number of positions by class and grade to "salary budgets" and "man-year" establishments. The new policies, which came into operation about 1970, provided departments with greater flexibility in the use of their manpower authority. Within certain limits, a single man-year may be used to employ one person for one year or two persons each for six months, or four persons each for three months, and so on. The number of persons who might be hired in any year to work the number of non-continuing man-years provided for in Estimates would therefore probably greatly exceed the actual number of such man-years. The directive of the Treasury Board referred to above no doubt served to bring many

casuals within the collective bargaining system but there is ground for concluding that the number of such employees who do not have the protection of collective agreements is substantial.

56. Although the directive of the Treasury Board referred to, and an earlier one of January 16, 1969, set the rates of pay for casual employees engaged for a period of less than six months, the practice established puts a premium on the hiring of casuals. They are entitled to no more than 4%³⁰ of their pay in lieu of annual leave, and they are not entitled, for example, to acting pay, call-back pay, shift premium, standby pay and pay for time in travel status, examination leave, disability insurance, hospital and medicare insurance premium benefits, supplementary hospital and medical insurance, or overtime meal allowances.

57. In the private sector, casual or temporary employees are subject to collective bargaining from the time they are hired, although in some instances or in some respects they may not enjoy all the rights conferred upon other employees under a collective agreement. In the Province of Quebec, the "government" work force includes many thousands of casuals, known as "employés occasionnels." They are not covered by collective agreements and they may be employed for cumulative periods (renewed terms) that exceed the six-month qualification that applies under the federal Public Service Staff Relations Act. They receive the minimum rate of the applicable salary and may also be granted increments based on performance. Although they are not entitled to fringe benefits, they are paid an increment of 15% over the job rate in lieu thereof. The Province of Ontario has a work force that also includes many thousands of casual employees. These casuals receive a less generous

fringe benefit package, similar in most respects to that provided casuals in the federal Public Service. Casuals are subject to collective bargaining after being employed continuously for a period of six months or more, although the Civil Service Association of Ontario has yet to reach an agreement with the Civil Service Commission of Ontario as to the fringe benefits and pay which are to apply to casuals.

58. Several courses come to mind as a means of eliminating any possibility that the hiring of casual employees may be resorted to as a device whereby employees can be exploited and denied terms and conditions of employment comparable to those of continuing employees. One is to make the provisions of the Public Service Staff Relations Act applicable to casual employees from the outset or soon after they are hired. The problem of affording protection under a collective agreement to short term employees and the administrative mechanisms that would have to be triggered make this approach impractical.³¹ Another approach, and this is the one that is recommended, is that casual or temporary employees who are not protected under collective agreements be given statutory assurance that their rates of pay (including premium pay and shift premiums), hours of work, annual leave and holiday entitlements and terms and conditions of employment directly related thereto will be the same as those generally established for employees doing similar work in the applicable category. They should be entitled to present grievances alleging non-compliance with terms and conditions of employment applicable to them. However, they should not be entitled to refer their grievances to adjudication. Many of the grievances that could conceivably arise here would involve what is in essence the interpretation

or application of a collective agreement or an amalgam of terms extracted from several collective agreements applicable to employees in bargaining units in the category. In the case of bargaining unit employees, grievances of this nature cannot be processed to adjudication without the support of a bargaining agent. Even if the circumstances that gave rise to the grievance were based on analogy to the terms of one collective agreement, it would be unwise to permit a casual employee to process a grievance on his own when to do so may be prejudicial to a bargaining agent and the employees in a particular bargaining unit. Nor would it be proper to burden a bargaining agent with the obligation of processing such a grievance for a person who is not a member of the bargaining unit. Practically all grievances that casual employees would be entitled to present in the circumstances contemplated by the recommendations for the protection of their interests would arise because of faulty administration at the local operational level. It is highly improbable that such grievances would not be corrected when they are brought to the attention of the deputy head.

59. The adoption of this recommendation would make it imperative that the confusion now existing as to what persons can truly be said to be employed on a casual or temporary basis should be eliminated. To this end, it is recommended that the reference in the definition of the term "employee" to the minimum period of six months be eliminated and be replaced by the words "unless he has been employed for not less than 120³² days in any continuous period of twelve months."

60. There are some programs, such as winter works programs, in respect of which persons are hired for temporary periods under special

employment programs of the federal government outside the manpower and budgetary authorities of the various departments. It has not been possible in the limited time at my disposal to ascertain what the scope of these programs may be and how they are administered. Consequently, I am not in a position to reach any conclusion as to how persons hired under these programs should be treated. It is suggested that the matter should be scrutinized carefully by the appropriate authorities.

61. Students hired for the "school vacation" periods, whether they are employed under a special program or have been provided for in the budgetary requirements of a department, are in a special position. In the administration of private sector legislation, students are generally regarded as having interests different from those of other employees and, even in the instances where they have been brought under the collective bargaining system, have usually been treated as forming separate bargaining units. To open the door to certification of bargaining agents for a multiplicity of bargaining units of students in the Public Service would impose on the Board, on the employer, and on the bargaining agents a burden that is not warranted by any demonstrated need. It is therefore recommended that there be inserted in the definition of the term "employee" another exclusion, namely, "students employed for the 'school vacation' periods." It should be pointed out that nothing in this recommendation would prevent a department from according to students working in that department the same treatment as that given to other casual employees.

62. In some bargaining units, particularly the ship repair unit, some employees have been retained on what might be regarded as a

renewable term basis for many years. Although they have been covered by the applicable collective agreement, in line with the Treasury Board circular quoted in paragraph 54, they are not entitled to superannuation and some other benefits available to employees appointed for an indeterminate period. I understand that efforts to confer on some of these employees an indeterminate style of appointment have not met with success in a considerable number of cases because the employees concerned may not fully meet the applicable selection standards or because the application of the merit principle precludes their being appointed. It is recommended that steps be taken to clean up an untidy situation that has developed over the years by making appropriate changes in the Public Service Employment Act or in the regulations thereunder to "grandfather" such employees to provide them with the status of indeterminate employees.

63. Personal service contracts: Another group of persons whose status has been commented on in the representations of the bargaining agents is that of persons engaged on what are referred to as contracts for personal service. The Treasury Board and the Public Service Commission are cognizant of the fact that the awarding of contracts for personal service, even though these may be for a limited period, may on occasion erode the work opportunities of existing staff and may undermine the merit principle. The Treasury Board has sought to establish guidelines to ensure that legal processes of appointment and of man-year controls are not circumvented. Despite these guidelines, it has been alleged by bargaining agents that, in some instances, persons are working under personal service contracts side by side with, and doing the same work under the same direction and control as, persons classed as employees.

64. As to the dimensions of the problem, information supplied by the Treasury Board indicates that, in 1971-72, 426 new contracts were entered into and an additional 63 were amended or extended; in 1972-73, 427 new contracts were entered into and 206 amended or extended. These figures may aptly be described as the tip of the iceberg, since the Regulations relating to Government Contracts,³³ apply only to those contracts that require the approval of the Treasury Board, i.e., those in excess of \$5,000. Contracts for less than that amount are entered into by departments without the approval of the Treasury Board and may be renewed from time to time by the department, again without Treasury Board approval.

65. On the other hand, it has generally been conceded by the bargaining agents that there are circumstances in which it is essential to the achievement of governmental or departmental goals or programs that work be contracted to persons with special skills and expertise who cannot readily be brought into the Public Service in the normal fashion. They recognize that, in increasing degree, government is becoming involved in project management, where change of pace is rapid, where it is crucial to the public interest to be able to bring into the counsels of government persons whose special experience enables them to make a unique contribution to the advancement of the public welfare.

66. To accommodate the needs of the employer and the interests of the bargaining agents, it is recommended that, subject to the exceptions proposed in paragraph 67, where a person enters into a contract with a department for the performance of personal services and

- (a) his duties and responsibilities are substantially similar to those of employees in a bargaining unit for which a bargaining agent has been certified,
- (b) he is subject to the same direction and control in the discharge of his duties and responsibilities as employees in such bargaining unit, and
- (c) his contract is for a period in excess of 60 working days,

he should be treated as an employee under the Public Service Staff Relations Act and be subject to the terms and conditions of employment applicable to a person appointed for a specified period, notwithstanding any contract he may have entered into with the department.

67. It is further recommended that, save for work normally performed by employees in the operational and administrative support categories - positions in these categories do not ordinarily call for the special qualities referred to earlier - the foregoing recommendation should not apply where

- (a) a person is engaged on a personal service contract to perform services of a creative and artistic nature, or
- (b)
 - (i) Parliament has passed legislation providing for the discharge of a substantially new function by the Public Service or a department or agency undertakes a major review or modification of an existing policy, program or administrative process, and
 - (ii) the deputy head of the department or the chief executive officer of the agency concerned within the twelve-month period following the coming into force of the revised legislation or the decision to undertake the review or modification enters into a contract for personal service in respect thereof with an individual and the contract is for a period not exceeding twenty-four months. If need to continue the personal service contract beyond the two-year period is

demonstrated, the Public Service Staff Relations Board would be empowered to grant an extension.

Again, it is recommended that no restrictions should be imposed on personal service contracts or similar arrangements which have as their principal purpose the training or development of the person concerned or an exchange of expertise between the federal government and some other jurisdiction unless and until such a person has been appointed to the Public Service under authority of the Public Service Employment Act or some other statute. It is further recommended that, either by statute or by administrative direction, every proposal for the engagement of a person under a personal service contract should contain a reference to the provision of law which, in specified circumstances, would render such a contract invalid and would substitute in its place terms and conditions of employment applicable to a person appointed for a specified period.

68. In relation to the administration of these recommendations, the Public Service Staff Relations Board should retain authority under section 33 of the Public Service Staff Relations Act to determine, in the same way as it has in the past, whether the relationship between the employer and a person ostensibly under a personal service contract is in reality an employment relationship that would bring such person within the boundaries of the Act.

69. To avoid any disruptive effect that the foregoing recommendations may have on personal service contracts in existence at the time of the coming into force of any amended legislation, it is recommended that contracts in effect at this time should not become subject to the foregoing recommendations during the term of such contracts or, with the approval of the Board, any renewal thereof.

FOOTNOTES

1. The term "Public Service" is used as defined in the Public Service Staff Relations Act, i.e.: "'Public Service' means the several positions in or under any department or other portion of the public service of Canada specified from time to time in Schedule I." Schedule I, as of the date of this report, is reproduced in **Appendix A**. The term "employer" means Her Majesty in right of Canada as represented by (a) in the case of any portion of the Public Service of Canada specified in Part I of Schedule I, the Treasury Board, and (b) in the case of any portion of the Public Service of Canada specified in Part II of Schedule I, the separate employer concerned.
2. The exceptions are (a) persons appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act; (b) persons locally engaged outside Canada; (c) persons whose compensation for the performance of the regular duties of their positions or offices consists of fees of office, or is related to the revenue of the office in which they are employed; (d) persons not required to work more than one-third of the normal period for persons doing similar work; (e) persons who are members or special constables of the Royal Canadian Mounted Police or who are employed by that Force under terms and conditions substantially the same as those of a member of the Force; (f) persons employed on a casual or temporary basis, unless they have been so employed for a period of six months or more; (g) persons employed by or under the Public Service Staff Relations Board; and (h) persons employed in a managerial or confidential capacity.
3. For example, actuaries, agronomists, auditors, biological scientists, chemists, economists, foresters, home economists, librarians, mathematicians, meteorologists, nurses, occupational and physical therapists, psychologists, social workers, and several groups of scientists engaged in research in the social and physical sciences.
4. S.O. 1943, c. 4.
5. S.S. 1944, c. 69.
6. S.Q. 1944, c. 30.
7. S.C. 1948, c. 54.
8. S.Q. 1964, c. 45.
9. Canadian Industrial Relations, The Report of the Task Force on Labour Relations, The Queen's Printer, Ottawa, 1969 (popularly known as the Woods Report), p. 139.
10. S.C. 1972, c. 18, subsection 125(3).

11. Supra, footnote 4.
12. P.C. 1003, February 17, 1944. Paragraph 2(1)(f) provides: "employee" means a person employed by an employer to do skilled or unskilled manual, clerical or technical work; but does not include
(i) a person employed in a confidential capacity or having authority to employ or discharge employees; ...
13. Supra, footnote 7. Paragraph 2(1)(i) provides: "employee" means a person employed to do skilled or unskilled manual, clerical or technical work, but does not include
(i) a manager or superintendent, or any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations; ...
14. Supra, footnote 9, p. 139.
15. Supra, footnote 10, subsection 125(4).
16. Two separate employers also sought severance of supervisors from non-supervisors in the operational category. In one case the same practice was followed as in the central administration of entering into separate but similar agreements during the first round of bargaining, concluding only one agreement for both units in the second round and reverting to separate agreements in the third round. In the other case, separate agreements were entered into during all three rounds of bargaining.
17. The expression "Federal Court" has been substituted for "Exchequer Court" pursuant to subsection 64(2) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.).
18. (1971) Board files 148-2-2, 148-2-3, 148-2-4.
19. The references to the Act in this excerpt from the decision are to the definition section as it was numbered prior to the coming into force of the Revised Statutes of Canada, 1970. The content of the definition remains unaltered.
20. Incidental to the procedure itself, it is recommended that the term "designated" in the present definition of the phrase "person employed in a managerial or confidential capacity" be replaced by the term "identified" to eliminate the confusion that has arisen by the application of the term "designated" to such persons as well as to persons designated as performing duties necessary in the

interest of the safety or security of the public under subsection 79(1) of the Act.

21. In an address to the Professional Institute of the Public Service of Canada, January 27, 1967. Quoted in the Second Annual Report of the Public Service Staff Relations Board, 1968-9, p. 24.
22. This is a figure extracted from the records of the Board as to designations at the time of certification and does not take account of designations that may have been made after certification in the various occupational groups brought into bargaining in those three years.
23. O. Kahn-Freund, Labour and the Law, p. 20.
24. As a well known jurist, Megarry J., of the English High Court of Justice, said: "A familiar difficulty in the judicial process is that of knowing where to draw the line. Lord Nottingham L.C. was pressed with it nearly three centuries ago ... 'Where will you stop if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible inconvenience doth appear.' Nearly two centuries later, Lord Cranworth L.C. expressed himself thus: 'The difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. ... There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.' ... Similarly, ... Lindley M.R. said 'It is urged that it is difficult to draw the line. I admit that it is extremely difficult It is always a question of degree.' ..." (Miscellany-at-Law, A Diversion for Lawyers and Others, London.)
25. S.C. 1972, c. 18.
26. Cf. pages 16 and 17.
27. The numbers have, of course, also increased in proportion to the increase in the size of the service.
28. S.C. 1972, c. 18, subsection 107 (1).
29. There are great fluctuations in the number of casuals hired from one month to the next over a calendar year. The average number of casuals could be estimated to be approximately ten to twelve per cent on average during a given year.
30. The minimum annual vacation leave under collective agreements in the Public Service at this time is, in most instances, three weeks after one year of service.
31. See in this regard a comment in the Report of the Delegation Review Team appointed by the Public Service Commission of October 1971, page 79, on another aspect of term appointment.

32. This figure is approximately equivalent to that now established for casuals in the Public Service Staff Relations Act and those applicable to such employees in Quebec and in Ontario.
33. P.C. 1964 - 1467, September 23, 1964.

Chapter 3

SCOPE OF BARGAINING

70. The main theme of the representations made by the bargaining agents was that the scope, i.e., the legally permissible subjects, of bargaining under the Public Service Staff Relations Act is glaringly inadequate when compared with the subjects on which trade unions are able to bargain under private sector legislation, and that public servants are thereby denied the opportunity to participate in a meaningful fashion in the determination of important aspects of their working conditions. They suggested the limitation on the scope of bargaining is one of the major impediments to the speedy and peaceful settlement of many disputes.¹ In some instances, the impediments have been side-stepped by written or oral assurances given by the employer that it would exercise its managerial functions in a specified manner. That the employer felt impelled to give such assurances is an acknowledgment by the employer of some sort of moral or social obligation to those particular employees. However, the very fact that resort had to be had to such stratagems to bring about a settlement of a dispute, it is said, demonstrates the need for broadening the scope of bargaining so as to include therein, wherever possible, those matters that must be considered as being matters of legitimate concern to the employees over which they ought to have some measure of control.

71. It has been said that

Bilateral determination is the essence of collective bargaining. By its very nature, bilateralism involves a dilution of the authority of the employer over the terms and conditions of employment. To the extent that matters affecting the employment relationship are brought within the scope of bargaining, joint decision-making by the parties to the bargaining relationship replaces the unilateral authority previously exercised by the employer.²

Are there considerations which make it imperative that matters within the unilateral authority presently exercised in the public-service context by the employer or by other agencies be excluded from bilateral determination?

72. Legal scholars and politicians alike continue to examine in considerable depth the question as to whether there are or are not fundamental differences between collective bargaining in the public sector and in the private sector. One would venture to suggest that much of the discussion on this score, couched in terms of principle, is frequently outdistanced by the facts of life. What was unthinkable yesterday has become the conventional wisdom of today.

It is more and more widely recognized that the relationship between public employees and the employing authorities, while retaining certain distinct characteristics, has drawn closer to the contractual employer-employee relationship in industry ... But ... the challenge of labor relations in public employment is not so much one of "catching up" with the private sector as one of finding solutions to a peculiar set of problems which are basically similar everywhere.³

73. In the private sector, over the years since the Wagner Act (the ancestor of labour relations legislation as we know it today not only in the United States but in Canada as well) first became law, the scope of bargaining, i.e., of shared decision-making, has been

progressively broadened until today it is fair to say that little is excluded from the legitimate scope of bargaining - in short, practically everything is bargainable. In so far as bargaining in the private sector is concerned, although one would hope that employers and trade unions do take the public interest into account, it is inevitable that the private interests of the parties are uppermost in their minds when they are sitting across the table from one another. Neither of them separately or collectively has the ultimate responsibility for protecting the public interest. Standing apart from the parties, there is always the government, which has the power and the responsibility, acting through Parliament, to impose restrictions upon the parties if it becomes apparent that the public interest is seriously endangered by the actions of the parties or either of them. In public sector bargaining, the government is not only a party to the bargaining process; it is also the executive arm of Parliament - the ultimate guardian of the public interest, the body which primarily has the responsibility for basic policy-making decisions.

74. As Arvid Anderson, Chairman of the New York Office of Collective Bargaining, has pointed out,

The major issue at the public bargaining table is the same as in the private sector; more wages, fringes and economic benefits. However, public employee unions are also seeking to use collective bargaining as a means of effectuating social change and for determining public policy questions ...⁴

... Teachers ... want to bargain about the school curriculum or class size; welfare workers ... want to bargain about the level of benefits of welfare recipients; interns ... want to bargain about the quality of medical services offered; nurses ... wish to bargain about the number of duty stations;

policemen ... want to regulate the number of men on a patrol or their authority to make arrests; and air controllers ... demand the right to bargain about their equipment and workload.⁵

75. No matter what extensions are made in the scope of bargaining from time to time, some subjects will probably remain in which the public interest will be paramount to any interest that the employees in the Public Service and the organizations representing them may have in bargaining, where the protection and furtherance of these interests cannot be left to shared decision-making by the employer and the employee organizations through bargaining, but must be examined and established by those who are answerable to the electorate. As one scholarly observer of the scene has put it "One ought never to confuse the wishes of a limited interest group like a union with those of the entire electorate."⁶ Class size in schools, case load for social workers and doctors, for example, may be legitimate subjects of bargaining to the extent to which they are aspects of the work load that employees are required to perform, but not when demands with regard to these matters are presented as an aspect of what constitutes good educational policy, or good welfare policy or good medical policy. The quality of education, of welfare and of medical care ought to be decided only through the normal legislative process. At times, it may be very difficult to draw the line between what can be entrusted to collective bargaining and what must be reserved to be dealt with only through the democratic process of legislation. But the line has to be drawn nevertheless to stay within the system as we have it.

76. This approach to the scope of bargaining is not intended to

denigrate the contributions that teachers, welfare workers and doctors can and do make to the determination of educational, welfare and medical care policy. Public servants possess great expertise in their respective fields and are probably imbued with a sense of responsibility for the public interest that is greater than in the case of employees in the private sector. Every effort should be made to open doors that would make it possible for government to avail itself of this expertise and to take advantage of the sense of commitment of public servants through appropriate consultation. There may indeed be a great need for the development of new channels of communication that would enable not only professionals, but technicians and other employees who possess special skills and aptitudes, to make a contribution to the formulation of policy. If this were done, employees would have greater work satisfaction, a satisfaction that some professionals believe, whether rightly or wrongly, they have been denied in the new relationship between employees and their superiors in public service resulting from the introduction of the collective bargaining process. However, such consultation must not be carried to a point where the public interest is authoritatively governed by the decisions of persons who have not been charged under our political system with the responsibility of deciding the quality of public service.

77. It follows from what I said earlier that, in my view, as a general principle, no change should be made in paragraph 56(2)(a) of the Public Service Staff Relations Act. This paragraph provides that:

(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,

- (a) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation ...

78. Four named statutes, the Government Employees Compensation Act, the Government Vessels Discipline Act, the Public Service Employment Act and the Public Service Superannuation Act, are given even broader "protection" under paragraph 56(2)(b) of the Public Service Staff Relations Act. In the case of the statutes that fall within paragraph 56(2)(a) of the Public Service Staff Relations Act, the statutes themselves are "protected" whereas, in the case of the four statutes that fall within paragraph 56(2)(b), what is excluded from bargaining are terms or conditions of employment that would conflict, directly or indirectly, with any term or condition of employment that has been or may be established pursuant to these four statutes. Since these statutes have a direct impact on terms and conditions of employment, some relevant provisions of each of them call for consideration.

The Public Service Employment Act

79. Some of the constraints on the scope of bargaining in the public service context are to be found in the authority conferred by the Public Service Employment Act on the Public Service Commission, an authority that is beyond the pale of management's direct influence. The Commission is endowed with a substantial degree of autonomy subject only to the budgetary restraints imposed by Parliament. The authority of the Commission is associated in the public mind with the preservation of the

merit principle, which has been described as the requirement that public employees be recruited, selected and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit. Before the advent of collective bargaining legislation for the public service, many of the agencies administering the merit principle were often charged also with responsibility for administering broad programs of personnel management, the whole coming to be known as the merit system. There are wide differences of opinion both in government circles and among employee organizations regarding the extent to which the constraints on collective bargaining imposed by legislation that vests authority respecting certain aspects of personnel administration in a civil service commission should be modified. No neat solution is possible.

80. Appointment and promotion: Two aspects of the merit principle are appointment and promotion. Access to employment opportunity is a bargainable issue under private sector legislation in many jurisdictions. On the other hand, there simply can be no argument about the question as to whether there ought to be equal opportunity for all of access to public employment. In addition, the career development aspect of public employment must be protected and furthered if government is to discharge effectively the numerous responsibilities that citizens look to it nowadays to carry out. To permit the establishment solely through collective bargaining of a different career development program for each bargaining unit would create ghettos from which an employee could escape only with the greatest difficulty. For employees in some bargaining units, the consequences of such ghettoization would be so great as to deter them

from entering the Public Service. Needless to say the harm to the public interest of such a course scarcely needs elaboration.

81. A similar danger can of course develop if the delegation of staffing authority to departments by the Public Service Commission pursuant to section 6⁷ of the Public Service Employment Act reduces the career horizon of public servants to the limits of their own departments. The report of the Public Service Commission's Delegation Review Team of October 1971 expressed concern about the tendency of departmental staffing officers to move from "departmental" to "open" competitions, thereby bypassing interdepartmental competitions, in the recruitment of persons to fill vacancies, and questioned whether this tendency complied with the spirit of section 11 of the Public Service Employment Act that "Appointments shall be made from within the Public Service except where, in the opinion of the Commission, it is not in the best interests of the Public Service to do so." It is to be hoped that the Commission's recent directive on "Areas of Competition" will correct this problem. Departmental career ghettos would contravene the merit principle just as surely as ghettos created by collective bargaining.

82. I do not see at this time any way in which to accord to bargaining agents the right to bargain on initial appointment or promotion and yet protect the public interest in the maintenance of the essential features of the merit principle itself. Consequently, I do not recommend that the authority to make initial appointments and promotions and to determine selection standards should be made subject to bargaining.

83. Selection standards: Several of the bargaining agents alleged that insufficient or no weight is given to seniority in the establishment of selection standards, whereas in many occupations in the private

sector seniority is a very important consideration in determining entitlement to promotion. It may be - time has not permitted any but the most cursory examination being made of the matter - that there should be a greater input by bargaining agents than they now have in the formulation of selection standards and the principles governing promotion of employees. There is an avenue now available for that purpose under subsection 12(3) of the Public Service Employment Act.⁸ However, there seems to be a feeling among the bargaining agents that the present arrangements for consultation are too haphazard to meet their needs. Their dissatisfaction with the present situation was forcefully expressed again and again throughout my interviews with them. Whether their impressions and views are sound or unsound is beside the point; the fact is that there is serious discontent - a state of mind that is detrimental to the development of a sound, harmonious relationship. It would appear to be desirable to eliminate this unhappy state of affairs. To this end, the provisions of the Public Service Employment Act or the procedures pursued thereunder with regard to consultation on selection standards and the principles governing promotions should be strengthened to provide the bargaining agents with assurance that, where the Commission exercises a discretion in relation to the administration of that Act in these areas, particularly in the preparation of regulations, selection standards or similar instruments, the bargaining agents will be consulted and will have an adequate opportunity to make their views known before such instruments are promulgated.

84. Selection of assignments: A number of the bargaining agents have made proposals that they be permitted to bargain the criteria,

rules and procedures governing the selection of employees for assignment to posts or work stations whose duties and responsibilities are substantially the same. To the extent that such reassignments involve "appointment" to a position not previously occupied by the employee concerned, they appear to involve the authority and jurisdiction of the Public Service Commission. Consequently, in such cases, collective bargaining in respect of such assignments would appear to be barred by paragraph 56(2)(b) of the Public Service Staff Relations Act. Historically, such assignments are included in that class of appointments identified as "transfers", and at present are protected from competition and the appeal process by paragraph 41(3)(b) of the Public Service Employment Regulations⁹ which refers to the appointment of a person "to a position for which the maximum rate of pay does not exceed the maximum rate of pay for the position held by that person immediately prior to the appointment, ...". Given the extent of delegation for appointments from the Commission to deputy heads, such appointments are now, for the most part, operationally, under the control of deputy heads.

85. It is possible to identify two situations:

- (a) those where the qualifications prescribed for the new position are sufficiently similar to the qualifications of the position previously held by a person so that he may be regarded as having the basic qualifications for the new position by virtue of having been qualified for appointment to his previous position, and
- (b) those where the qualifications prescribed for the new position are sufficiently different to require the certification of his qualifications for the new position by the Commission or someone acting for the Commission under delegated authority.

86. In many circumstances, the duties and responsibilities of

what are described in the Public Service as "different positions" are as alike as peas in a pod. Within a department, and especially in particular operational areas within a department, there are many situations in which the duties and responsibilities of quite a number of work stations are identical, or substantially similar. In many areas, in effect, like positions are pooled, and employees move around from one work station to another, without any necessity for reappraisal of their qualifications. In recent years provisions have been made in the postal operations collective agreement for procedures and criteria which are to govern the selection of employees for assignment to preferred jobs. In some of these situations, the moves may be between work stations, with all positions included in a common pool. In other cases, however, reassignments may well involve formal reappointment, especially where such assignments are between postal stations or depots. The existence of departmental rules and procedures which do not accord with the "order of merit" principle, and of provisions of collective agreements which have been voluntarily entered into between the employer and bargaining agents emphasize the need to remove assignments of the type described in (a) in paragraph 85 from the jurisdiction of the Public Service Commission so that there can be no doubt that they may be dealt with, legally, in the process of collective bargaining.

87. It may be alleged that such a course constitutes a threat to the merit system. I have examined this argument with care and conclude that the recommendation which I make below would not force any new de facto transfer of authority from the Commission to deputy heads or the employer. The Commission has in practice removed itself from this

area of personnel management, except in relation to its determination of the selection standards that are to apply to every class of position. I do not propose that the Commission's authority in this regard should be changed in any way, nor should the Commission's authority in respect of appointments of the type described in (b) in paragraph 85 be affected.

88. I therefore recommend that

- (a) the Public Service Employment Act should be revised to provide that, where the Commission has in its selection standards established common qualifications (i.e., selection standards) applicable to an identified grouping of positions and the parties agree that the duties and responsibilities set out in the job descriptions of the several positions are interchangeable, appointments (i.e., transfers) between positions in the grouping would be excluded from the jurisdiction of the Commission and be subject to the authority of the Treasury Board as employer, or to deputy heads acting as agents of the employer;
- (b) the Public Service Staff Relations Act should be revised to permit collective bargaining on procedures and criteria governing the order of preference for transfers of employees between positions or work stations within such a grouping, and the geographic or administrative boundaries within which such preferences could be exercised and on whether such transfers should be subject to a probationary period;
- (c) the Public Service Employment Act should provide that the order of preference provided for in that statute, i.e., for employees returning from leave of absence, ministerial staffs, lay-offs and so on, would supersede any order of preference established by the employer, either unilaterally or in a collective agreement.

89. In a number of cases which have been referred to adjudicators and to the Board since the present legislation was enacted, there has

been great difficulty in trying to determine the rights of the employee as a public servant, and his right in relation to his appointment to a specific position. It has been put to me that appointments to positions reflect a view of the Public Service as a permanently structured, rigidly institutionalized bureaucracy which does not accord with the constantly changing dynamic service that has emerged in the past decade. Clearly, there are many circumstances in which positions are pooled and there is no longer a clear "contractual" relationship between an employee and a particular position. There are also many circumstances in which employees are no longer discharging the duties of the position to which they are appointed. In other circumstances, public servants are engaged over many years in project activities, with their duties and responsibilities changing fairly regularly. In these circumstances the duties and responsibilities which are reflected in the employee's formal "contract", i.e., in his position description, are little more than fiction. The practice of appointing an individual to a specific position restricts the mobility of staff. The Commission should consider the possibility of making some appointments in such a way that the appointee will not be "restricted" to a specific position.

90. These are not matters which my personal experience, or my present mandate, qualifies me to comment upon in any depth, or to offer solutions. To the extent that there are problems in this area, they may be of an order which cannot be dealt with in the context of the current review and revision of the legislation. However, I urge upon those who are responsible, and who have the expertise to deal with these matters, to deal with them "with all deliberate speed."

91. Job security: For many years after the merit principle became the norm for the making of appointments to the Public Service, the acceptance of an appointment to a position in the Service, for all practical purposes, carried with it an exceptionally high degree of job security. Recently, however, economic lay-offs, reorganizations, relocations, technological changes, contracting out and similar occurrences and policies have brought public servants to the realization that "job loss" is indeed a distinct possibility for them. Since the rule applicable at the present time is what is popularly known as "the reverse order of merit," a stigma attaches to the laid off or redundant employee in the Public Service that invariably has a most traumatic effect upon him. Job security has therefore emerged as a key issue in the representations that have been made by all bargaining agents. Critics may charge that provisions for job security, whether established by statute or by collective bargaining, promote inefficiency and act as a deterrent to the improvement of public services. In general, however, those arguments can scarcely be decisive when the job security of employees in the Public Service has actually been threatened, as it has in the recent years. It behooves us therefore to examine the state of the law and practice to ascertain what the present situation is and to determine what, if anything, should be recommended with regard thereto for the future.

92. At the present time, lay-off is a matter that falls within the jurisdiction of the Public Service Commission and is excluded from the scope of bargaining under the Public Service Staff Relations Act by virtue of paragraph 56(2)(b) of the latter Act. Section 29 of the

Public Service Employment Act reads as follows:

29. (1) Where the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations of the Commission, may lay off the employee.

(2) An employee ceases to be an employee when he is laid off pursuant to subsection (1).

(3) Notwithstanding anything in this Act, the Commission shall, within such period and in such order as it may determine, consider a lay-off for appointment, without competition and, subject to sections 30 and 37, in priority to all other persons, to any position in the Public Service for which in the opinion of the Commission he is qualified.

(4) Notwithstanding subsection (2), a lay-off is entitled, during such period as the Commission may determine for any case or class of case, to enter any competition for which he would have been eligible had he not been laid off.

Sections 30 and 37 of the Public Service Employment Act, referred to in subsection 29(3) of that Act, deal respectively with priorities for employees on leave of absence and members of ministerial staffs. They read as follows:

30. (1) Where an employee is on leave of absence and another person has been appointed for an indeterminate period to the position that was occupied by him, the employee is entitled, during his leave of absence and for a period of one year thereafter, to be appointed, without competition and in priority to all other persons, to another position in the Public Service for which in the opinion of the Commission he is qualified.

(2) Where, during the time that an employee was on leave of absence, another person was appointed for an indeterminate period to the position previously occupied by the employee, if the employee returns to the position previously occupied by him the other person is entitled, for a period of one year after the employee returns to that position, to be appointed, without competition and in priority to all other persons, to a position in the Public Service for which in the

opinion of the Commission he is qualified.

(3) The Commission shall determine the order in which those persons to whom subsections (1) and (2) apply are to be appointed to positions in the Public Service.

37. (1) A Minister may appoint his Executive Assistant and other persons required in his office.

(2) A person who is employed in the office of a Minister ceases to be so employed thirty days after the person holding the position of such Minister ceases to hold that position.

(3) A person who

- (a) was an employee immediately before he became employed in the office of a Minister, or
- (b) during the time that he was employed in the office of a Minister, qualified for appointment under this Act to the Public Service

is entitled, for a period of one year from the day on which he ceases to be so employed, to be appointed without competition and, subject to section 30, in priority to all other persons, to a position in the Public Service for which in the opinion of the Commission he is qualified.

(4) A person who for at least three years has been employed as Executive Assistant, Special Assistant or Private Secretary to a Minister, or in any of those capacities successively, is entitled, for a period of one year from the day on which he ceases to be so employed, to be appointed without competition and, subject to section 30 and subsection (3) of this section, in priority to all other persons to a position in the Public Service, at a level at least equivalent to the level of private secretary to a deputy head, for which in the opinion of the Commission he is qualified.

(5) The Commission shall determine the order in which those persons to whom subsection (3) or (4) applies are to be appointed to positions in the Public Service.

(6) This section applies to a person employed in the office of the person holding the recognized position of Leader of the Opposition in the House of Commons, Leader of the Government in the Senate or Leader of the Opposition in the Senate, as it applies to a person employed in the office of a Minister.

93. The problem of lay-off is inextricably intertwined with that of recall and it is in respect of recall that any attempt to accommodate the demands of the bargaining agents for a more substantial role in the area of job security must take due account of the historic role of the Commission in the administration of the merit system. My point of departure, therefore, is that the Commission's exclusive authority must be maintained to

- (a) establish selection standards for various classes of positions;
- (b) determine, in relation to appointment, whether a candidate possesses the minimum qualifications required for the performance of the duties of his function; and
- (c) appoint persons to the Public Service.

Flowing from its authority under the Public Service Employment Act, the Commission has an obligation at present to:

- (a) give employees who have been laid off priority consideration for appointment over certain other candidates; and
- (b) to hear and determine appeals from any employee who alleges that the rights and protection afforded to him by statute have been abridged because of the proposed appointment of another person to a vacant position.

94. Under the legislation applicable to lay-off at the present time, since the authority of a deputy head to lay off employees must be exercised according to regulations made by the Commission, there is nothing in law that would deprive the Commission of the capacity to protect the job expectations of long service employees, a capacity which extends beyond the interest of the employees in any particular bargaining unit.

The situation with regard to recall of laid off employees may be otherwise. What effect would the transfer of power to the parties in bargaining to determine lay-off and recall on a unit-by-unit basis have on this capacity of the Commission and on the job expectations of long service employees? For an appreciation of what is involved, it may be well to compare the situation in the federal Public Service with that in the private sector.

95. In the private sector, many industrial unions usually press to have seniority observed as the sole factor that is to govern the order in which employees are to be laid off. Most collective agreements do treat seniority as an important factor, although not in all cases the decisive factor, for that purpose. In the typical plant situation in the private sector, one usually finds separate seniority lists for lay-off and recall purposes for unskilled workers, skilled workers and so on. In multi-plant operations spread over the country, there are usually separate seniority lists for each geographic location. Generally speaking, employees in the private sector do not normally move from a seniority group in one collective agreement to a seniority group in another collective agreement. Almost without exception, employees working at the same location and doing substantially the same work will fall under the same seniority list.

96. In the federal Public Service, so far as the central administration is concerned, there are presently 72 distinct occupational groups and 80 bargaining units. Tradesmen doing substantially the same work may be included in a variety of occupational groups and in different bargaining units. For example, tradesmen working at the

dockyards located in Halifax and Esquimalt may be included in either the ship repair occupational group or the general labour and trades occupational group, depending on whether they are performing work related to repair and overhaul of water craft or whether they are maintaining the dock facilities. Cleaners and elevator operators may be in the hospital services unit, if they are working in a hospital environment, and the same types of employees are to be found in a general services occupational group in the same geographical location if they are working in an office. What has been said of tradesmen is equally applicable to many of the other occupational groups. In terms of mobility, there is considerable movement between the administrative services, program administration, personnel administration and clerical and regulatory occupational groups.

97. To accord to each bargaining agent at this time the right to bargain on lay-off and recall on a unit-by-unit basis would lead in the future to the possible, indeed one might say in some cases the probable, ghettoization of employees in specific occupational groups, or sub-groups or bargaining units within an occupational group (within conceivably narrow geographical boundaries). The situation can be aptly pictured by paraphrasing a quotation that appears in the report of the Task Force on Labour Relations:¹⁰ Though the employees within the bargaining unit would be equal to each other, they would be unequal with others outside the unit; a little egalitarian island would have been created in the midst of a sea of inequality. Artificial barriers might be erected against the movement of laid off employees across bargaining unit lines to available positions for which they are qualified.

The protection in law of length of service, which the bargaining agents are so anxious to have considered as a factor in determining the order of redundancy, lay-off and recall, would become meaningless for many employees. It is imperative that, in any plan devised to deal with lay-off, for whatever reason, and with recall in the Public Service, safeguards be built in that will prevent erosion of the traditional protection provided by the employer in the past for long service employees. Should this protection be significantly diminished, whether it be by collective bargaining or otherwise, there would undoubtedly be a public outcry that would lead ultimately to legislative revocation of any power that might be conferred on the parties to deal with these matters wholly on a bargaining unit basis.

98. The state of affairs outlined above furnishes a compelling reason for seeking an approach to dealing with lay-off and recall which would reconcile the essential authority and responsibility of the Commission with the interests of the employees. I recommend that the criteria and procedures governing the order of lay-off and recall and the extent of notice which the employer should be required to give an employee before lay-off should not be made bargainable, but the financial impact of lay-off (relocation costs, severance pay and other emoluments consequent on lay-off) should remain bargainable as is the case at present. However, statutory protection, in the manner set out below, should be afforded to employees on notice of lay-off or who have been laid off, whether it be because of lack of work, the discontinuance of a function, "redundancy" or the contracting-out of work.

99. It is recommended that the Public Service Commission be

vested with authority to establish by regulation

- (a) the order in which employees whose duties and responsibilities are substantially the same are to be laid off, and
- (b) the order in which employees who have been laid off and who have the minimum qualifications required for appointment to a vacant position are to be recalled,

so as to provide for preference of employment to be given, as the Commission may deem appropriate having regard to geographic, organizational, occupational or any other relevant consideration, to the employee who has the longest continuous service in the Public Service. Employees on notice of lay-off or who have been laid off would have statutory priority rights of appointment to vacancies in their own or another occupational group as at present, but henceforth based on possession of the minimum qualifications required for appointment to a vacant position, or the capability of becoming qualified after a reasonable period in the position, and with the seniority factor being taken into account. It is not contemplated that there should be any material departure from the flexibility which currently obtains in the reassignment and relocation of affected personnel, i.e., there should be no rigid barriers outside of which an employee could not locate. Reassignment would normally be attempted in the same order as it is at present under the Manpower Adjustment Procedures, which were introduced to cover a special situation, but which I understand have been used to cope with "redundancies" that have occurred since 1969. This order, which is not invariable, has been as follows:

- (a) local reassignment within departments;
- (b) local reassignment between departments;

- (c) relocation and reassignment within departments;
- (d) relocation and reassignment between departments.

If the foregoing recommendation is adopted, the Commission would, of course, retain the authority it now has under subsection 29(3) of the Public Service Employment Act to determine the period within which a laid off employee has an entitlement to be recalled. Section 37 of the Public Service Employment Regulations presently fixes the period at twelve months from the day an employee is laid off. This period seems to be reasonable. It is the intent of this recommendation that the authority of the Commission to recall employees who have been laid off should not be subject to the veto of a deputy head. The latter should not be entitled to reject such an employee subsequently as a probationer without the prior approval of the Commission.

100. It is further recommended that, subject to the exceptions set out below, employees should be entitled to a statutory minimum period of lay-off notice to be fixed on a sliding scale in accordance with length of service. The scale for employees appointed for an indeterminate period should be one day's notice for each completed month of service, up to 132 days, but with a minimum of 10 days, provided that an employee who has reached 35 years of age and has completed five years of service should accumulate two days of notice for each month of service completed after that date, up to 132 days in all. No statutory entitlement to notice should accrue to an employee who is to be laid off for a period not in excess of 20 continuous working days or for periods not in excess of 30 working days in a continuous period of

60 working days. However, a person laid off in accordance with the immediately preceding recommendation is not to be regarded as having ceased to be an employee because of the operation of subsection 29(2) of the Public Service Employment Act. In some respects, employees laid off in the past may have received more favourable treatment in the way of notice than is provided in the foregoing recommendations. It should be borne in mind, however, that the recommendations provide for a minimum protection of a statutory nature, whereas what occurred in the past had no statutory base. In making recommendations of this nature, one ought not to proceed on the assumption that the Commission would thereby be led to adopt a less generous approach to employees about to be laid off than it has in the past. It should also be borne in mind that the recommendations in this report for the recall of laid off employees should reduce the need to resort to the recommended notice-in-case-of-lay-off provisions, to the benefit of the employees and, indirectly, to the employer as well.

101. If the recommendation regarding notice of lay-off is adopted, provision would have to be made in the relevant legislation to deal with those employees who, although they hold indeterminate appointments, are scheduled to work on what might be called a seasonal basis, e.g., lightkeepers, lock keepers, parks employees and the like. During the "off season" such employees are not, and should not be, looked upon as being laid off in the sense in which that term has been used in this section of the report.

102. Since the proposals for bargaining regarding the selection of assignments made in paragraph 88 may appear to conflict with the

recommendations regarding lay-off and recall, the legislation should make it clear that, where lay-off or recall is involved, the regulations of the Commission with regard to these matters supersede the provisions of a collective agreement regarding selection of assignments.

103. Although the foregoing recommendations relating to notice in the event of lay-off apply to employees appointed for an indeterminate period, there are other employees in the Public Service whose position in the event of the termination of their employment should be examined. I refer to employees appointed for a specified period who, by virtue of the recommendations made earlier in this report regarding casuals, would become members of various bargaining units. Indeed, some of them are appointed for a specified term which is extended from time to time, or are reappointed periodically or for a specified period of fairly long duration. Although from one point of view such employees may be said to accept employment with the knowledge that it would be terminated by a specified date, nevertheless from another point of view their term of employment may be seen as not much different from that for persons appointed for an indeterminate period. It is impossible, without much more intensive study than I am able to undertake at this time, to make concrete recommendations as to the treatment in respect of notice that should be accorded to such employees. I would therefore suggest that the responsible authorities give consideration to this situation at an early opportunity.

104. The entitlement to recall should be subject to certain conditions to ensure that a laid off employee does not abuse his entitlement. Thus, if an employee has refused recall to the position from

which he was laid off or a position having substantially the same duties and responsibilities, he should forfeit any further right to recall unless the location of the new position imposes an undue hardship on the employee. Again, if he is recalled to a position classified at the same level, but having duties and responsibilities substantially different from those of the position from which he was laid off, or to a position classified at a lower level than the position from which he was laid off, he should be permitted to refuse, without legitimate reason, no more than one recall on pain of forfeiting further right to recall. If he accepts recall to a position at a lower level, he should be protected against competition and appeal for reassignment to a position at the level he formerly held within time to be fixed by the Commission.

105. Since the foregoing recommendations are intended as a substitute for making certain aspects of lay-off and recall bargainable, there should be some recourse for an employee to challenge the procedures and application of the criteria that led to his being laid off or that relate to his recall or failure to be recalled. The appropriate authority to provide such recourse is the Commission and an appropriate mechanism should be established in the Commission for this purpose.

106. The successful implementation of the foregoing recommendations would depend to a large extent upon adequate channels of communication being established between the several departments and agencies of government, the Commission, the employees and the bargaining agents. There does not appear to be any comprehensive inventory of vacancies in the Public Service or adequate means of informing interested

persons of the facts concerning vacancies. The lack of such information could deny an employee an effective remedy. It is obvious that notice of intention to lay off, of redundancies and similar conditions, and of vacancies would have to be given by deputy heads to the Commission to enable it to carry out its responsibilities under the plan that has been recommended. Consideration should be given by the Commission and others who may have responsibilities in these areas to establishing a system by which the necessary information could be made readily available to all concerned.¹¹ It is obvious that procedures will have to be devised, as they already have been in some departments of government, to ensure that the administration will be able to respond promptly to lay-off and recall situations. Otherwise, the objective of the recommendations in this portion of the report will not be achieved.

107. Probation: The length of the probationary period for new employees and the rights that probationary employees may enjoy under the terms of a collective agreement are matters that are bargainable in the private sector. In so far as the federal Public Service is concerned, probation is governed by the Public Service Employment Act, section 28 of which provides:

28. (1) An employee shall be considered to be on probation from the date of his appointment until the end of such period as the Commission may establish for any employee or class of employees.

(2) Where an appointment is made from within the Public Service, the deputy head may, if he considers it appropriate in any case, reduce or waive the probationary period.

(3) The deputy head may, at any time during the probationary period, give notice to the employee and to the Commission that he intends to reject the employee for cause at the

end of such notice period as the Commission may establish for any employee or class of employees and, unless the Commission appoints the employee to another position in the Public Service before the end of the notice period applicable in the case of the employee, he ceases to be an employee at the end of that period.

(4) Where a deputy head gives notice that he intends to reject an employee for cause pursuant to subsection (3) he shall furnish to the Commission his reasons therefor.

(5) Notwithstanding anything in this Act, a person who ceases to be an employee pursuant to subsection (3)

(a) shall, if the appointment held by him was made from within the Public Service, and

(b) may, in any other case, be placed by the Commission on such eligible list and in such place thereon as in the opinion of the Commission is commensurate with his qualifications.

108. At the time of the coming into force of collective bargaining legislation for the Public Service, regulations issued under the Public Service Employment Act established probationary periods for various groups of continuing employees ranging from a minimum of 12 months to a maximum of 24 months. By an amendment to the Public Service Employment Regulations on December 18, 1968, the probationary periods were considerably reduced - for employees in the operational and administrative support categories, to 6 months; for employees in all other occupational categories, to 12 months. A deputy head has the power to extend probation for any employee for a period not in excess of the original probationary period applicable to a class of positions. In a sense, employees appointed for a specified period remain on probation throughout the term of their employment and, if they are given what is known as a Type 8 appointment - i.e., the appointment of an employee, whose

tenure was for a specified period, for an indeterminate period, without a change in occupational group, sub-division level or department - there may in effect be a further period of probation tacked on.

109. Although, among the representations made by the bargaining agents are included requests that many matters now within the jurisdiction of the Commission be made bargainable, none of them asked specifically that probation be made bargainable. I believe this reflects a view that the whole pattern and traditions of the Public Service militate against making probation a bargainable issue and I make no recommendation that there be any change in the law in that regard other than in the special circumstances set out in paragraph 88. However, concern has been expressed in many quarters about the way in which the provisions of the Public Service Employment Act quoted above affect the welfare of probationers in the Public Service. The problems that arise from the operation of section 28 of the Public Service Employment Act may be dealt with under two heads:

- (a) probation as it affects appointments from within the Public Service, and
- (b) probation as it affects appointments from outside the Public Service.

(a) The effect of section 28 of the Public Service Employment Act is that a person from within the service, i.e., a person who is promoted or transferred, no matter what the length of his appointment in the Public Service may have been and no matter how satisfactory his performance may have been in the position he held before his promotion or transfer, may in certain eventualities cease to be an employee at the end of the prescribed period of notice. Although a deputy head is required to furnish to the Commission his reasons for rejecting an

employee on probation, the validity of the reasons is not subject to review by any third party, except in an indirect manner, i.e., where a grievance is presented by a probationer and the grievance is carried to adjudication alleging that the real reason for the rejection is disciplinary in character. The authority of an adjudicator to deal with such a grievance has been challenged by the employer and it may be anticipated that this question will be referred in due course to the Federal Court for determination. If the position of the employer were to be upheld by the Federal Court, it would follow that a long service employee who, the Commission found, merited promotion could have his employment terminated following his promotion at the mere whim of a deputy head.

110. A person appointed from within the Public Service, if rejected by the deputy head, must be placed by the Commission on an eligible list and in such place thereon as in the opinion of the Commission is commensurate with his qualifications. However, since he must compete with others on a merit basis, any advantage that he may derive from being placed on an eligible list may afford him small comfort or protection. Although there have been relatively few cases in which the distressing situation has arisen that a probationary employee promoted from within the Public Service has been rejected during the probationary period and has not been appointed to another position, where this does occur it excites attention of a dramatic sort.¹² The treatment that may be accorded to a probationary employee in such circumstances is much less favourable than that usually accorded to an employee in similar circumstances in the private sector. It is difficult to justify a state

of affairs in which an employee who was found by the Commission to be qualified for promotion can accept promotion only at the risk of possible total severance from the service, or a lengthy period of unemployment.

111. To overcome this inequitable situation, it is recommended that an employee appointed from within the Public Service, if rejected by a deputy head, should have a right of appeal to the Commission, which should be entitled to determine whether the employee has been given a reasonable opportunity to demonstrate his suitability for the position to which he was appointed, with power vested in the Commission to reinstate him in his probationary status or extend the period of probation if it deems it proper to do so. If the Commission upholds the deputy head, the employee should be given notice of rejection equal to that provided in law under the recommendations in respect of a person who is laid off. During the period of notice he should be paid at a level equal to that which he received in the position he occupied at the time of his appointment to the new position. For the purposes of further employment, he should retain his status as an employee and have the same rights of recall, as of the date that he receives notice of rejection, as an employee who has been laid off.

112. It is further recommended that an employee on probation should not be permitted to challenge his rejection during the probationary period as a grievance referable to adjudication under the Public Service Staff Relations Act. The remedy that would be available to a probationer through the Commission, especially since the Commission would be able to reassign him, should give to a rejected probationer protection at least equivalent to what he would be able to obtain

through adjudication.

113. Under section 28 of the Public Service Employment Act, the period of probation for any employee runs from the date of his appointment until the end of such period as the Public Service Commission may establish for any employee or class of employees. As we have seen, the Commission has established, by section 30 of the Public Service Employment Regulations, fixed periods of probation for various classes or groups of employees. But it has also empowered a deputy head to extend the probationary period of any employee, the extension not to exceed the length of the initial probationary period. It is recommended that an employee whose probationary period has been extended should be accorded the same right to present a grievance against release for any cause as any continuing employee. The effect of this recommendation would not relieve the employee of demonstrating that he possesses the necessary qualifications for the position. However, there might well be a heavier onus resting on him to show that this release was for disciplinary reasons than would be the case with an aggrieved employee who had "survived" the probationary period.

114. (b) In so far as a person appointed from outside the Public Service is concerned, a different approach suggests itself. In the private sector, an employer is usually free, under a collective agreement, to release a new employee during the probationary period without assigning cause. I do not recommend that persons of the type here under discussion be given the same protection as persons appointed from within the Service. Incidentally, it should be pointed out that probationers of this type do have the right to present a grievance against

their release and process it through the grievance procedure to the final level. A decision to release a probationer may therefore be reversed by the deputy head.

115. In some respects, the situation of a person appointed from outside the Public Service may be quite different from that which obtains in the case of appointments in the private sector, particularly for positions in occupational groups such as those in the professional and scientific category and the administrative and foreign service category. Because the federal government is a national employer, both in relation to its obligation to recruit and appoint Canadians from all parts of Canada and in relation to the national scope of its operations, a substantial proportion of new recruits to the Public Service must relocate to take up their appointments. For such persons the consequences of failure during probation are much more serious than for persons who accept employment with employers in the community in which they reside. Such persons may experience considerable dislocation in accepting a position in the Public Service and, if they are rejected during the probationary period, they may not readily be able to find other suitable employment. The number of persons who are rejected by government departments and agencies during probation is not insignificant. In the twelve-month period ending 30th September 1973, some 450 persons who were selected for employment under the authority of the Public Service Commission were rejected during probation and released from the service. There is evidence which indicates that probationary employees are sometimes rejected more or less on the whim of their immediate supervisors, and that, at least in some departments, the procedures

providing for review of the proposed action are insufficient to provide assurance that the probationer has had a fair trial. While I am not moved to propose the introduction of any rights in law for probationers who have been appointed from outside the service, I am nevertheless concerned that, within the personnel systems of the Public Service, they receive a "fair shake." Perhaps departments could establish better induction procedures and also performance appraisal procedures for new recruits so that they would receive early feed-back on supervisory evaluation of their performance. Effective appraisal procedures which pinpoint problems and suggest solutions can sometimes remove the causes of unacceptable performance. Directors of personnel might also review the role played by personnel officers in the evaluation of employee performance during probation so that their "good offices" might be brought to bear in circumstances where time and patience are required to overcome initial problems and tensions. Finally, even though statutory review procedures may not be called for, the image of the Public Service as a fair employer might be improved if directors of personnel were to insure that no probationer was rejected without a careful internal review of the circumstances which led to his proposed rejection.

116. As was indicated earlier, the length of the probationary period has not been reviewed by the Commission since the latter part of 1968. An examination by the Canada Department of Labour of provisions of collective agreements discloses that only a small fraction of the agreements in establishments under federal jurisdiction covering 200 employees or more, excluding the construction industry, set a probationary period after hiring that runs as long as six months. Indeed,

the vast majority fix a much shorter period. It should be noted, however, that most of the agreements reviewed in this analysis probably apply to employees of the type that, in the Public Service, would be included in occupational groups in the operational, technical and administrative support categories. Time does not permit an examination of the situation to determine whether there are special reasons that would warrant the probationary period in the Public Service being as long as it is. It would appear that the Commission might profitably review its regulations in this respect to ascertain whether

- (a) having regard to practice in the private sector, the present regulations provide an appropriate probationary period for each class of employee, and
- (b) a person appointed from within the Public Service, including a person appointed for a specified period, should remain in a probationary status for the same period as a person from outside the Public Service.

117. Training: Section 5 of the Public Service Employment Act provides in part that "The Commission shall ... (b) operate and assist deputy heads in the operation of staff training and development programs in the Public Service." Section 33 of that Act declares that "Subject to this Act, the Commission may make such regulations as it considers necessary to carry out and give effect to this Act." Again paragraph 7(1)(b) of the Financial Administration Act vests in the Treasury Board authority to "determine requirements for the training and development of personnel in the public service and fix the terms on which such training and development may be carried out ...". The subject of training is therefore a responsibility shared by the Commission and by the employer. Since, as we have seen, the Public Service Employment Act is

one of the statutes "protected" by paragraph 56(2)(b) of the Public Service Staff Relations Act, not only are the provisions of the Act itself "protected" but also any term or condition of employment that has been or may be made under the Act. Doubts have arisen as to what aspects, if any, of training programs may be subject to collective bargaining.

118. There does not appear to me to be any sound reason for denying the bargaining agents the right to bargain on the availability of programs and the terms and conditions under which an employee may have access to training programs or to participate in such programs. I therefore recommend that any doubts on this score should be removed by appropriate provision in the Public Service Staff Relations Act. However, I recommend that no bargaining agent should be entitled to bargain with the employer regarding the course content of training programs.

119. It is recommended that there be excluded from the foregoing proposals as to bargaining on aspects of training the whole gamut of language training under the Government's Official Languages Policy for the Public Service based on the requirements of the Official Languages Act.¹³ It should be noted in this connection that the Treasury Board Guidelines relating to this policy were developed in consultation with all the bargaining agents within the last few months and it would be unwise to introduce at this stage anything that would open this matter to debate in a collective bargaining context.

120. "Performance evaluation": The Commission has the final say, the terminal decision, in employee appraisal in so far as it is part of its ongoing responsibility for making appointments to positions from

within the Public Service. To this end, the Commission has provided in section 13¹⁴ of the Public Service Employment Regulations as follows:

13. (1) An employee appraisal is an evaluation of an employee
 - (a) in which the employee, the employee's supervisor and a review committee of one or more managers participate; and
 - (b) that results in a written record that includes
 - (i) an assessment of the employee's overall performance and achievement during the evaluation period,
 - (ii) an indication of the capacities and interests of the employee for future employment, and
 - (iii) current data on the employee's demonstrated occupational skills.
- (2) The assessment of an employee's performance shall be based on selection standards, completed by the supervisor, shown to the employee and signed by both the supervisor and the employee.
- (3) A copy of each record referred to in subsection (1) shall be sent to the Commission in respect of employees in such categories and groups as may be designated by the Commission.

121. An employee has an interest, quite distinct from that of the Commission, in knowing whether he meets the requirements of his position, in being protected against arbitrary standards of performance set by an agent of the employer and in being assured that the records of his performance are not distorted. In addition, performance evaluation may also affect an employee's entitlement to an increase in wages which is not tied to any new appointment in which the Commission would play a role. There is nothing in the Commission's regulations to ensure that the appraisal of an employee for purposes other than those that concern the Commission would be made in the manner provided in the Commission's regulations. For that matter, although those regulations promise a

degree of objectivity in the process of evaluation, there is no provision for independent third-party review of the appraisal, an appraisal which can be relied on by a deputy head for purposes other than those of the Commission.

122. It is my recommendation that performance evaluation be made bargainable but that nothing in a collective agreement relating to performance evaluation or appraisal should be construed to deny to the Commission the right to obtain, in such manner as it may deem appropriate, such information relating to, or evaluation of, the performance of an employee as it may require to discharge its responsibilities under the Public Service Employment Act.

Government Vessels Discipline Act

123. The Government Vessels Discipline Act is one of the statutes listed in Schedule III of the Public Service Staff Relations Act and given the special protection accorded by subsection 56(2)(b) of the last-mentioned Act. The representative of the Canadian Merchant Service Guild, the bargaining agent for the employees in the ships officers occupational group, stated that the provisions of the Government Vessels Discipline Act had not been applied in practice to ships officers for many years. He suggested that the provisions of that Act are in conflict with the letter and the spirit of the Public Service Staff Relations Act and should be repealed. Section 9 of the Government Vessels Discipline Act states:

9. Whenever any person subject to this Act commits any of the following offences, he is liable on conviction before a commissioner, or before any justice of the peace,

- (a) for desertion, to imprisonment for any term not exceeding four weeks with or without hard labour, and also to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned;
- (b) for neglecting or refusing, without reasonable cause, to join his vessel, or to proceed on any voyage or cruise in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, or for absence at any time, without leave and without sufficient reason, from his vessel, or from his duty, not amounting to desertion, to imprisonment for any term not exceeding four weeks with or without hard labour, and also at the discretion of the commissioner, or justice, to forfeit out of his wages a sum not exceeding the amount of ten days pay;
- (c) for quitting the vessel without leave after its arrival in port at the close of the season of navigation, and before the vessel is placed in security, to forfeit out of his wages a sum not exceeding ten days pay;
- (d) for wilful disobedience to any lawful command, to imprisonment for any term not exceeding four weeks, with or without hard labour, and also at the discretion of the commissioner or justice, to forfeit out of his wages a sum not exceeding two days pay;
- (e) for continued wilful disobedience to lawful commands, or continued wilful neglect of duty, to imprisonment for any term not exceeding four weeks, with or without hard labour, and also, at the discretion of the commissioner or justice, to forfeit for every twenty-four hours continuance of such disobedience or neglect, a sum not exceeding two days pay;
- (f) for assaulting any master or officer of any Canadian Government vessel, to imprisonment for any term not exceeding four weeks, with or without hard labour;
- (g) for combining with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the vessel or the progress of the voyage or the continuance of the cruise, to imprisonment for any term not exceeding four weeks, with or without hard labour; and
- (h) for wilfully damaging the vessel, or embezzling or wilfully damaging any of its stores, to forfeit out of his wages a sum equal in amount to

the loss thereby sustained, and also, at the discretion of the commissioner or justice, to imprisonment for any term not exceeding four weeks, with or without hard labour.

A memorandum of the Department of Transport on Disciplinary Policies, Standards & Procedures, issued on May 15, 1967, contains the following statement:

Section 9 of the Government Vessels Discipline Act

Apart from the disciplinary procedures set forth in this article, all officers and men employed in Canadian Coast Guard ships are subject to the provisions of the Government Vessels Discipline Act. Legal proceedings under Section 9 of that Act are not to be taken against any person engaged under the Act without Ottawa Headquarters consent. It is expected that most of the cases requiring disciplinary action may be dealt with more readily under the other procedures outlined in this article.¹⁵

124. Time does not permit a careful examination as whether the continuance of the Government Vessels Discipline Act is or is not necessary. I therefore must content myself with the recommendation that the appropriate authorities look into the situation at the earliest opportunity. If it should not be deemed desirable to amend or repeal the Government Vessels Discipline Act, consideration might be given to deleting reference to it in Schedule III of the Public Service Staff Relations Act, in which event it would still have the protection accorded to any other Act of Parliament under paragraph 56(2)(a) of that Act.

Government Employees Compensation Act

125. The Government Employees Compensation Act provides for compensation being paid to an employee or to his dependents in case of

personal injury to the employee through accident arising out of and in the course of his employment or in case of his being disabled by reason of an industrial disease due to the nature of his employment. The Act is one of those listed in Schedule III of the Public Service Staff Relations Act and is governed by paragraph 56(2)(b) of that Act, the legal implications of which have been discussed earlier. Doubts have arisen as to whether it is permissible for the parties to include in a collective agreement a provision for the payment of "compensation benefits" over and above those determined according to the Government Employees Compensation Act. Under private sector legislation, it is permissible for trade unions to negotiate such additional "compensation benefits." As a matter of fact, the majority of collective agreements in the Public Service do contain provisions for what is referred to as "injury-on-duty leave" at full pay for certain periods of time. It is recommended that doubts as to the legality of such provisions be removed so as to ensure that such additional compensation benefits constitute a bargainable issue.

Public Service Superannuation Act

126. Most of the briefs presented by the bargaining agents favoured making superannuation a bargainable subject. At present, superannuation benefits are governed by the Public Service Superannuation Act, the Supplementary Retirement Benefits Act¹⁶ and the Statute Law (Supplementary Retirement Benefits) Amendment Act, 1973.¹⁷ Terms and conditions of employment governed by the Public Service Superannuation Act and any regulations made thereunder are removed from the collective bargaining process by paragraph 56(2)(b) of the Public Service Staff

Relations Act. The Public Service Superannuation Act consists of three parts. Part I covers superannuation - the pension plan; Part II provides for a supplementary death benefit; and Part III deals with supplementary retirement benefits contributions. The Supplementary Retirement Benefits Act of 1970 introduced an escalation feature tied to the Canada Pension Plan¹⁸ which limited the escalation to an annual maximum of two per cent. The Statute Law (Supplementary Retirement Benefits) Amendment Act of 1973 changed the escalation formula so that pensions would reflect fully changes in the consumer price index. It also amended the contribution-rate provisions of the Public Service Superannuation Act.

127. The result of permitting the establishment through collective bargaining of a different pension plan for each bargaining unit would be the same as for appointment and promotion. In addition, fragmentation in bargaining pensions might well jeopardize the actuarial soundness of the "superannuation fund," and of pension entitlements that employees had already acquired, and would seriously inhibit employee mobility. It may be that some plan of coalition bargaining could perhaps be devised to meet the needs of the situation. However, time does not permit the thorough examination of the problem that would be required to enable one to express any concluded opinion thereon. Consequently, I do not recommend that pension contributions, benefits or characteristics should be made bargainable issues. In other words, I recommend that Parts I and III of the Public Service Superannuation Act remain in Schedule III to the Public Service Staff Relations Act and that there be added to the Schedule the Supplementary Retirement Benefits Act

and the Statute Law (Supplementary Retirement Benefits) Amendment Act of 1973.

128. The arrangement presently in force under the Public Service Superannuation Act for consultation between the employer and the representatives of the employees limits the input of the latter group to participation in an advisory committee. The advisory committee does not include representatives of all the bargaining agents and the advisory committee is primarily confined in its discussions to matters placed on the agenda by the employer. Consideration should be given to the expansion of the advisory committee so that all bargaining agents would have an opportunity to be represented thereon. Consideration should also be given to providing an opportunity for the employee representatives on the advisory committee to introduce matters on the agenda for discussion.

129. Part II of the Public Service Superannuation Act, which provides for supplementary death benefits, stands on a different footing from the other parts of the Act. Its essential characteristic is that of a term insurance scheme. The bargaining agents believe that there is inequity in the arrangements for the sharing of the cost of the program as between the employer and the employees and that there is an imbalance between the premiums paid by the employees and the benefits paid out annually since the plan was inaugurated. There is an actuarial consideration here that I am not in a position to examine or assess in the time at my disposal. One would have to look at the costs of administration and also to ascertain whether any alleged "imbalance" will be redressed as the plan matures.

130. To recommend that the supplementary death benefits be made fully bargainable would have serious consequences detrimental to many employees because of the insurance implications of such a step and because Part I and Part II of the Public Service Superannuation Act are interrelated.¹⁹ However, the law as it stands imposes restrictions on the capacity of a bargaining agent to bargain some type of ancillary or additional death benefits coverage. In addition, there would appear to be a conflict in principle between the law now applicable to supplementary death benefits and that which may be applicable to disability benefits, which have been treated as bargainable. The latter are in the main dealt with on a service-wide basis through the National Joint Council. I therefore recommend that Part II of the Public Service Superannuation Act should be deleted from Schedule III of the Public Service Staff Relations Act. It would still be "protected" to the extent to which other statutes are protected by paragraph 56(2)(a) of the latter Act. I wish to make it clear that, in making this recommendation, I express no opinion as to the feasibility from an actuarial point of view of negotiating additional or ancillary death benefits on a unit-by-unit basis.

Section 7 of the Public Service Staff Relations Act

131. There is a wide variety of matters, other than those that come within the statutes so far discussed, concerning which doubts have been expressed from time to time as to whether they do or do not come within the scope of bargaining under the Public Service Staff Relations Act. For an appreciation of the problems that arise, it may be well to review briefly the totality of the provisions that circumscribe the

scope of bargaining under the Act. One's point of departure is the definition in that Act of the term "collective agreement":

"collective agreement" means an agreement in writing entered into under this Act between the employer, on the one hand, and a bargaining agent, on the other hand, containing provisions respecting terms and conditions of employment and related matters (emphasis added).

The phrase "related matters" is not expressly defined in the Act. However, subsection 70(1) sets out what may be the subject-matter of an arbitral award. Although, as will be seen later, the jurisdiction of the Public Service Arbitration Tribunal does not extend to all items that are negotiable, it is safe to conclude that a matter expressly declared to be one that may be included in an arbitral award is also bargainable. The matters declared to be arbitrable by subsection 70(1) are "rates of pay, hours of work, leave entitlements, standards of discipline, and other terms and conditions directly related thereto."

132. As we have seen, certain matters that may be comprehended within the phrase "terms and conditions of employment and related matters" are excluded from bargaining by virtue of subsection 56(2) of the Public Service Staff Relations Act and these have been dealt with earlier in some detail.²⁰ If the recommendations in this report are adopted, a limited number of the subjects now excluded from bargaining by subsection 56(2) would become bargainable, but in the main the subjects now covered by the paragraph would remain in the same state as they are today.

133. A further limitation on the legally permissible subjects of bargaining derives from the language of section 7 of the Public

Service Staff Relations Act, which declares that

Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.

As I had occasion to point out in the terms of reference to the conciliation board in the Postal Operations Case No. 2,²¹

The section declares in unequivocal terms that nothing in the Act is to be construed to affect the right or authority of the Employer to do certain things. In other words, even if the Employer were to agree to include in a collective agreement a provision that limited its right or authority say to classify positions in the Public Service, it would not be bound by that provision.

134. It could be argued that the employer should not seek legislative constraints upon the subjects of bargaining such as are provided in section 7. In the private sector, labour relations boards, particularly in the United States but to a much lesser degree in Canada, have been called upon to resolve disputes over negotiability questions. It has been suggested by some students of the problem that the undue intrusion by an employee organization in the course of the bargaining process into areas in which the employer should not be required, on public policy grounds, to engage in joint decision-making could be adequately taken care of by decisions of a board such as the Public Service Staff Relations Board when called upon to deal with the nature and extent of the duty to bargain. This suggestion should be examined in relation to the several items listed in section 7 - organization of the Public Service, assignment of duties and classification of positions.

135. Organization of the Public Service: For reasons indicated earlier,²² I am not persuaded that the federal government, with the vast areas of responsibility it is called upon to assume in modern society, should be at the mercy of a tribunal, even though it were possessed of the wisdom of Solomon, which would have the power to determine whether government policy on the organization of any service or activity provided by government, e.g., issues of centralization or decentralization, the organization and reorganization of departments, the location of centres for the rendering of service and so on, should be subject to pressure by any special interest group in a bargaining context. Accordingly, I do not recommend that the organization of the Public Service be made bargainable.

136. "Contracting out" of work that has been, or is being, done by employees in a bargaining unit has been held to be an aspect of organization of the Public Service and therefore excluded from bargaining under section 7 of the Public Service Staff Relations Act. It is recommended that the authority of the employer to contract out work be preserved.

137. The impact of reorganization on employees, such as relocation and severance benefits, are now bargainable and should remain so. Other aspects of reorganization have been dealt with earlier in this report²³ in connection with the recommendations regarding lay-off.

138. Assignment of duties to positions: The assignment of duties to positions is an inseparable aspect of the organization of the Public Service and in my view must continue to be totally reserved to the employer. The employer's authority to assign duties to employees,

although not specifically provided for in section 7 of the Public Service Staff Relations Act, may be construed as flowing directly from the authority to assign duties to positions. Representations have been made to me that, from time to time, employees are required to perform duties which are not provided for in their job descriptions, or encompassed by their job classifications. While I can appreciate the feelings engendered in employees when they are asked to perform duties totally unrelated to those referred to in their job descriptions, or which appear to them menial or debasing when compared to their ordinary duties, I do not feel that opening up this area to collective bargaining is the appropriate remedy for the problems that have been identified.

139. The classification system and the formal position descriptions represent an attempt by the employer to bring a substantial measure of order to what would otherwise be an extremely chaotic working environment. They provide every employee with certain basic assurances and, in a general sense, establish a predictable relationship between the employee and his employer. However, I do not believe that the Public Service could respond effectively to the dynamic and diverse demands which are made upon it if managers and supervisors were to be totally constrained by law or by collective agreements, to observing classification standards or job descriptions in assigning duties to positions or to employees. The exigencies of the Public Service must be a paramount consideration. However, where there is an abuse of discretion by managers, the appropriate remedy lies in the grievance procedure; where abuse is brought to the attention of a deputy head through this means, he should intervene to make it abundantly clear that the misuse

of the discretion in the operational context cannot be tolerated. Infringement of the dignity of an employee may be more harmful to a healthy employer-employee relationship than a violation of a legal right.

140. Classification of positions: Under the Public Service Staff Relations Act, as it stands, classification standards are set unilaterally by the employer, although in practice there has been a good deal of consultation between the representatives of the employer and the representatives of the bargaining agents with regard thereto. The practice of consultation was in operation even before collective bargaining became part of the federal Public Service scene and has continued since 1967. Representations have been made to me by the Treasury Board Secretariat that the Treasury Board's record of consultation on changes and improvements in classification standards is such as to obviate any need to encroach on its authority in regard to classification.

141. I venture to say that the record of the Treasury Board in attempting to operate in this area in an objective and professional manner is as good as that of many employers in both the public and private sectors. Nevertheless, the fact remains that the retention of authority by the employer, especially where the opportunity for consultation accorded to the bargaining agents can be looked upon only as a matter of grace, fails to take into account the legitimate interest of bargaining agents in this area. It fails to take into account their claim to active participation, as a matter of right, in the modification of standards, whether it be the complete revision

of a standard to bring it into line with changes in occupational practices or otherwise or to deal with a particular problem in a standard that may be identified by a bargaining agent. Indeed, every one of the bargaining agents has pressed upon me the need, having regard for the impact of classification standards on so many aspects of the collective bargaining relationship, including the composition of bargaining units and the pay plans that may be established either through negotiations or by an arbitral award, for making classification standards a bargainable item.

142. Every aspect of the question as to whether classification standards should be included within the scope of bargaining received a good deal of attention during my interviews with the representatives of the bargaining agents and with the Treasury Board Secretariat. The nature and quality of classification standards, the dimensions of the problems that would confront the parties if classification standards were made bargainable, the time that might be required to develop a proper standard, the time relationship between negotiations for the renewal of a collective agreement and the development of a standard, the total resources that would be required by the parties if they embarked on a program of bargaining standards, the problems that would confront third parties called upon to resolve an impasse if one should be reached in the course of bargaining - the list could be amplified almost ad infinitum - all were thoroughly canvassed.

143. One of the considerations that has weighed heavily with me is that of resources. Several of the bargaining agents were firmly convinced that they had the present capacity, or could attain the capacity

in short order, to enter into bargaining on classification standards. While this may be the case with respect to a very few whose members occupy a fairly homogeneous group of positions confined entirely or largely to one government department, doubts remain that all bargaining agents have the resources to engage in effective bargaining on classification standards in the immediate future.

144. The bargaining agents whose members occupy a fairly homogeneous group of positions are to be found chiefly among those who have chosen the conciliation board option for the settlement of interest disputes. Even if one were to assume that these bargaining agents could adequately bargain classification standards within the next few years, one cannot contemplate with any degree of equanimity the weight of the burden that would be thrown on a conciliation board called upon to make recommendations on a classification standard to be included in a collective agreement if the parties were to reach an impasse in bargaining on that issue. To find properly qualified persons for a conciliation board who could devote sufficient consecutive days to the task so that they might be able to make recommendations on classification standards within the time frame usually considered acceptable for the conciliation board process strikes me as a "mission impossible," especially in the context of the resolution of disputes on a variety of other issues and having regard also to the number of units that might be engaged in bargaining at any one time.

145. The matter is further complicated when one turns to consider the bargaining units for which the arbitration option is specified. What I have just said about the enormous difficulties associated with

leaving classification standards to be dealt with by conciliation boards is equally applicable to the reference of such standards to arbitration. There is here also the added factor that there would be less likelihood, where arbitration is the dispute resolution process, than there is where the recourse is to a conciliation board, of a "trade off" that might help to resolve a dispute concerning classification. For one thing, the pressure on the bargaining agent from particular groups of employees to have the classification standard applicable to their positions referred to arbitration would probably be irresistible. Thus, even if it were feasible to make classification standards bargainable for those units that have chosen the conciliation board route, I am convinced that it would not be possible at this stage to do so for those who rely on arbitration. Any suggestion that classification standards might be made fully bargainable for those who are subject to conciliation boards, but not for those subject to arbitration would create an intolerable situation. As I pointed out earlier, a legislative scheme must be of general application.²⁴

146. Having regard to the considerations I have outlined in paragraphs 143 to 145, some of which I have discussed at length and some of which I have mentioned only in passing, I have come to the conclusion that it is not feasible to make classification standards a bargainable item at this time. However, I do recommend that a formal system of consultation on classification standards be introduced. The system outlined in paragraphs 151 to 158 of this report rests on the foundation already built by the employer and should provide both the bargaining agents and the employer with the experience that might be required

should it be determined at some time in the future that classification standards should be made bargainable. The recommendations I am making in connection with classification standards do not, in my view, endanger the capacity of the employer to discharge its duty to Parliament and to the people of Canada in the proper and effective management of the "government enterprise."

147. There are a number of factors to be taken into account in developing a process providing reasonable assurance of effective consultation on classification standards. The timing of the consultation process should be such that the effect of any resultant changes in a standard can be accurately evaluated in relation to the terms and conditions of employment that may be negotiated between the parties. Since pay rates are so closely tied to classification in most segments of the Public Service, employees, in those situations where there is a significant revision in a classification standard, are not in a position to form an intelligent opinion as to the acceptability of a pay plan developed in the course of negotiations until the extent of the revision in the classification standard and its effect upon them have been made known to them. Ignorance of how a standard will affect various groups of employees can only protract negotiations and lead to unrest. Again, there are clusters of occupational groups in the same category where the utilization of common principles and techniques may be deemed desirable. A proper plan of consultation ought to make it not only possible, but also provide an inducement, to deal with all the groups in such a cluster at or about the same time.

148. Experience has shown that, in some instances, especially

where a major revision of a standard is sought or is being undertaken, the time frame for completing the consultation process may be quite long. Both parties have to have an adequate opportunity to develop alternate techniques for the resolution of particular problems and to evaluate the impact of proposals for change on the work force. Indeed, one must not overlook the fact that the Treasury Board has the practical need to consult on two fronts at the same time, i.e., with the bargaining agent and with the major user departments, and must allow time to have an effective input in the process from those departments.

149. I mentioned in paragraph 143 the problem of resources involved in making classification standards bargainable. The same problems have to be considered and given due weight in the development of a plan for consultation on classification standards. The very number of groups, subgroups and levels in the existing classification structure gives some indication of what may be in store. There are presently 72 occupational groups in the central administration.²⁵ It does not necessarily follow from what I have said so far that consultation is likely to be invoked with regard to standards for all of them. Great progress has been made in working out the classification revision program initiated in 1964. However, in introducing a new plan for consultation along the lines of the recommendations that follow, where consultation becomes a right, it is essential to ensure that there will be a reasonable distribution of the workload over time.

150. Finally, in this connection, it is desirable that a standard, once established should be protected against additional processes of

consultation for a reasonable length of time. It is imperative in the interests of all concerned that there be a high degree of stability in a standard once it has been established, not only because of the effort that must be put forth to establish the standard, but also because of the misgivings as to the validity of the standard that are likely to be engendered in the minds of the employees if the standard appears to be in a constant state of flux.

151. Taking these major factors into account, it is recommended that all occupational groups in the "central administration" of the Public Service should be "scheduled" for possible review in a time frame period as follows:

(a) Initial Consultation Cycle

<u>Date</u>	<u>Category</u>	<u>No. of groups</u>
Jan. 1, 1975	Operational	12
Oct. 1, 1975	Technical	14
July 1, 1976	Scientific and Professional (Division A)	14
April 1, 1977	Scientific and Professional (Division B) ²⁶	14
Jan. 1, 1978	Administrative Support and Administrative and Foreign Services	19

(b) Continuing Consultation Cycle (5 years)

<u>Date</u>	<u>Category</u>
Jan. 1, 1979	Operational
Jan. 1, 1980	Technical
Jan. 1, 1981	Scientific and Professional (Division A)
Jan. 1, 1982	Scientific and Professional (Division B)
Jan. 1, 1983	Administrative Support and Adminis- trative and Foreign Services
Jan. 1, 1984	Operational (commence- ment of third cycle)

To enshrine these time frames in express and precise terms in the legislation would introduce a degree of rigidity into the plan that might make it unwieldy. There may be changes in the categories or in the occupational groups within the existing categories or it may be desirable to include in one phase of a cycle occupational groups in more than one category. It is therefore recommended that authority be vested in the Public Service Staff Relations Board to specify by regulation the structure of both the initial and the continuing cycles, but the authority should be couched in terms that would require such regulations to conform in general to the time frames set out above. The Board should also be vested with authority to make adjustments in the continuing cycle as circumstances might require. The Board should also be authorized to establish by regulation suitable cycles for the separate employers.

152. It is recommended that, if a bargaining agent should desire to consult with respect to the classification of positions occupied by employees in a bargaining unit, it should give notice of such desire within a period of not less than 90 days preceding the commencement of the phase of the cycle referable to the appropriate occupational group. Where special circumstances arise that, in the view of a bargaining agent, warrant re-examination of a standard or any element in a standard outside the cycle, the bargaining agent should be entitled to seek consent from the Public Service Staff Relations Board to give notice to consult. The onus of proving that special circumstances exist would be on the bargaining agent and the Board should have the authority to attach to its consent, if given, such terms and conditions as it may deem proper in the circumstances. On occasion, it becomes apparent both to the employer and to the bargaining agent that a standard or some element in a standard should be revised. The legislation should provide that, where both parties consent thereto, consultation may take place at any time even though not in conformity with the cycle and even in the absence of a showing of special circumstances. The employer should be entitled to initiate consultation for the introduction of a new standard or revision of an existing standard at any time, but should be denied the right to implement an altered standard until the consultation process, as hereinafter outlined, had been exhausted.

153. There may be instances in which a bargaining agent would be given leave by the Board to give notice to consult outside the cycle, or the employer might initiate consultation and the process of consultation might come to an end within a relatively short time before the

onset of the phase of the cycle applicable to the bargaining unit that had been involved in the consultation. It would not be sound practice to have the same situation canvassed again so soon simply because the phase of the cycle had been reached that would make such a review possible. It is therefore recommended that, in such circumstances, the employer should be entitled to apply to the Board to have consultation in accordance with the cycle postponed, in so far as concerns any request at that time for consultation on aspects of the classification standard that had already been examined, for such period as the Board might direct.

154. Where notice to consult has been given by the bargaining agent or by the employer, the parties should be required to meet and consult in good faith within the thirty-day period following the commencement of the applicable phase, where the review is of a cyclical nature, or within 30 days following the giving of notice in all other cases. Hopefully, the consultation process will result in a consensus being reached in due course. Experience with collective bargaining indicates that, in the majority of cases, the parties can and do reach agreement without outside assistance and the parties should be encouraged to settle their problems through their own efforts to the greatest possible extent compatible with the general principles of the legislation. Where a consensus is not arrived at, it is recommended that a limited opportunity be provided for third-party mediation. Mediators have played an important role in resolving differences between parties in many areas of employer-employee relations - it is scarcely necessary to spell out in this report their usual frame of reference or method

of operation - and I am confident that they will play an equally significant and helpful role in resolving disagreement with regard to classification standards. A mediator may serve a useful purpose where the parties have become conventionalized in their thinking and a third party is able to give a new thrust to the discussion. The opportunity afforded to bargaining agents to invoke the assistance of a mediator in the consultation process will also help to dispel the feeling that now seems to permeate the attitude of some of the bargaining agents toward the existing consultation process, whether this feeling is justified or not is beside the point, that consultation today is no more than an empty gesture on the part of management. Needless to say, a mediator functioning in this area would have to be skilled in the subject both in depth and in breadth.

155. In some instances, consultation on classification standards is likely to appear on the surface to be an extremely long drawn out process. All those interviewed conceded that, in some instances, it must of necessity be a lengthy process. I do not think it would be desirable to have a mediator brought into the process at too early a stage. If the parties jointly wish to have the assistance of a mediator, they should be entitled to ask for an appointment of a mediator at any time after consultation commences. Absent a joint application, either party should be entitled to request that the Chairman of the Public Service Staff Relations Board appoint such an officer. However, in that event, the Chairman should not make an appointment until he had consulted with the parties and then only if he were of opinion that the intervention of a mediator was likely to serve

the interest of the parties in reaching an understanding. A mediator should not be interposed between the parties unless there is reason to believe that his intervention will be of value. It is not envisaged that the mediator would make any recommendations as to how the differences between the parties are to be reconciled if he fails to effect an understanding between them.

156. Limitations should also be placed on the time that a mediator, if appointed, should devote in an attempt to reconcile the differences between the parties. The initial period should be limited to 30 days and his appointment should be subject to abridgment or enlargement (a) by the Chairman of the Public Service Staff Relations Board, after consultation with the parties, or (b) by the parties themselves.

157. Consultation should never become an interminable process. A point is reached where an impasse develops and the views of the parties remain irreconcilable. However, some safeguards must be built into the system to ensure that adequate consultation has taken place. To achieve this objective, it is recommended that either party should be entitled to terminate consultation

- (a) at any time
 - (i) with the consent of the Chairman, where no mediator has been appointed,
 - (ii) following the termination of mediation, where a mediator has been appointed,
 - (iii) where both parties agree that there is no hope of reconciling their differences, or
- (b) after the expiration of one year from the commencement of consultation.

158. If the consultation process fails to produce a consensus, the employer would be free to take action unilaterally in the manner herein-

after set forth. To eliminate the possibility of matters being left in limbo after the termination of the consultation process, it is recommended that the employer should be required, within a period of three months, or such longer period as the Board on application might approve, to inform the bargaining agent concerned that the existing standard would continue in effect or give notice of its intention to institute a revised standard. If it is common ground between the parties that the revised standard requires no new rate of pay, the employer should make it operable forthwith. If the revised standard, in the view of either of the parties, requires a new or revised rate of pay, the parties should be required to consult with regard thereto. If they do not reach agreement on the rate or rates within 30 days after the bargaining agent is informed by the employer that it proposes to institute the standard, the employer should make the revised standard operable at that time and establish an interim rate or rates. If the dispute resolution process is the conciliation board option, the parties would be able to renegotiate the rate during the next round of bargaining. If the process specified is arbitration, the bargaining agent could also, of course, renegotiate the rate during the next round of bargaining. If, where this process is applicable, the parties fail to reach agreement, the bargaining agent should be entitled to join issue on the rate in the course of arbitration and the tribunal should be authorized to make an award on the rate retroactively to the effective date of the application of the new standard, notwithstanding the provisions of section 72 of the Public Service Staff Relations Act.²⁷

159. Although it is recommended that classification standards

should not be made bargainable, there are a number of recommendations regarding classification grievances in Chapter 5 of this report.

160. In light of the recommendations set forth in the instant chapter on the several aspects of section 7 of the Public Service Staff Relations Act, it follows that the section should remain unaltered save for appropriate language to accommodate the recommendations on consultation with regard to classification standards and on classification grievances.

Some Additional Subjects

161. There remain for consideration a number of other matters which the bargaining agents seek to have made subject to bargaining. Several of them concern the relationship between the bargaining agent and the employer rather than the employee and the employer. Examples are: access by representatives of the bargaining agent to the premises of the employer, use of bulletin boards, use by a bargaining agent of the employer's internal mail distribution system, the availability of information concerning names, classification and location of employees in a bargaining unit, time off for representatives of bargaining agents and provisions for joint consultation. Many collective agreements in the Public Service do contain provisions relating to some of these matters. However, they are not expressly comprehended within the language of the definition of the term "collective agreement" which identifies specifically only "terms and conditions of employment and related matters." It is recommended that the definition be amended to make it clear that there is included within the subjects on which bargaining is permitted the mutual rights and obligations of the employer and the bargaining agent in the conduct of the relationship under a collective agreement or arbitral award.

FOOTNOTES

1. See in this connection certain comments in the terms of reference of the conciliation board in the Postal Operations Case No. 3, (Board files 190-2-19, 190-2-20):

It is obvious, as appears clearly from the submissions of counsel for both parties, that the proposal of the Bargaining Agent here under consideration is not a matter that can be included in the terms of reference of a conciliation board. Nevertheless, the issues that are raised by this proposal are indeed of grave concern to the employees in the bargaining unit. They reflect the fear of employees that their future welfare may be affected, seriously and detrimentally, by technological innovations. Whether that fear is justified or unjustified in view of commitments that have been made by the Employer is immaterial at this point. The fact is that it exists and that it will undoubtedly hang like a pall over the deliberations of the Conciliation Board in this dispute. If it were not discussed openly, it would insinuate itself in some fashion into the discussion on the other items. It would be unrealistic to say that the Conciliation Board is forbidden to discuss the problems of technological changes. I would therefore suggest that you might devote some, but not an undue, amount of time to seeking a formula, apart from the terms of the collective agreement, that would allay the fears of the employees.

2. Final Report of the Assembly Advisory Council on Public Employee Relations, California State Assembly, March 15, 1973, p. 101.
3. D. A. Morse, "Labor Relations in the Public Sector" in Proceedings of the International Symposium on Public Employment Labour Relations, New York, May 3-5, 1971, p. 41 at pp. 45, 48.
4. A. Anderson, "Public Employee Bargaining." Urban Lawyer, Vol. 1 (Fall 1969), p. 317.
5. A. Anderson, speech before United States Conference of Mayors, Denver, Colorado, June 14, 1970, p. 6 (quoted in Prasow and others, Scope of Bargaining in the Public Sector - Concepts and Problems, Washington, D.C.: U.S. Department of Labor Public Sector Labor Relations Information Exchange, 1972 at p. 19).

6. Charles M. Rehmus, in Proceedings of the International Symposium on Public Employment Labor Relations, New York, May 3-5, 1971, p. 51.
7. Section 6 of the Public Service Employment Act is as follows:

6. (1) The Commission may authorize a deputy head to exercise and perform, in such manner and subject to such terms and conditions as the Commission directs, any of the powers, functions and duties of the Commission under this Act, other than the powers, functions and duties of the Commission in relation to appeals under sections 21 and 31 and inquiries under section 32.

(2) Where the Commission is of opinion

(a) that a person who has been or is about to be appointed to or from within the Public Service pursuant to authority granted by it under this section, does not have the qualifications that are necessary to perform the duties of the position he occupies or would occupy, or

(b) that the appointment of a person to or from within the Public Service pursuant to authority granted by it under this section has been or would be in contravention of the terms and conditions under which the authority was granted,

the Commission, notwithstanding anything in this Act but subject to subsection (3), shall revoke the appointment or direct that the appointment not be made, as the case may be, and may thereupon appoint that person at a level that in the opinion of the Commission is commensurate with his qualifications.

(3) An appointment from within the Public Service may be revoked by the Commission pursuant to subsection (2) only upon the recommendation of a board established by it to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, are given an opportunity of being heard.

(4) The Commission may, from time to time as it sees fit, revise or rescind and reinstate the authority granted by it pursuant to this section.

(5) Subject to subsection (6) a deputy head may authorize one or more persons under his jurisdiction to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.

(6) In the absence of the deputy head, the person designated by the deputy head or, if no person has been so designated or there is no deputy head, the person designated by the person who under the Financial Administration Act is the appropriate Minister with respect to the department or other portion of the Public Service, or such other person as may be designated by the Governor in Council, has and may exercise the powers, functions and duties of the deputy head.

8. Subsection 12(3) of the Public Service Employment Act is as follows:

(3) The Commission shall from time to time consult with representatives of any employee organization certified as a bargaining agent under the Public Service Staff Relations Act or with the employer as defined in that Act, with respect to the selection standards that may be prescribed under subsection (1) or the principles governing the appraisal, promotion, demotion, transfer, lay-off or release of employees, at the request of such representatives or of the employer or where in the opinion of the Commission such consultation is necessary or desirable.

9. Paragraph 41(3)(b) of the Public Service Employment Regulations provides that sections 41 and 12 do not apply where the appointment of a person is made from within the Public Service without competition. Sections 12 and 41 are summarized in footnotes 13 and 14 to Chapter 6.
10. Canadian Industrial Relations, The Report of the Task Force on Labour Relations, The Queen's Printer, Ottawa, 1969 (popularly known as the Woods Report), p. 114.
11. See in this connection Frank C. Knight, "Data Stream and the individual within the system" in Optimum, vol. 4, no. 3, 1973, pp. 42 ff.
12. For example, see the following adjudication decisions:
M.J. Gallant, (1969) PSSR Reports M 605;
Fisher, Adjudication File 166-2-359;
J.P. Gallant, Adjudication File 166-2-581;
McPhie, Adjudication File 166-2-590.
13. R.S.C. 1970, c. O-2.
14. As amended on November 20, 1968, by SOR/69 - 592.

15. Disciplinary action taken under the said procedures could presumably be made the subject of a grievance under the Public Service Staff Relations Act.
16. R.S.C. 1970, c. 43 (1st Supp.).
17. S.C. 1973 - 1974, c. 36
18. R.S.C. 1970, c. C-5.
19. In the sense that both parts contribute to estate planning. Part I provides for enriched pension allowance for dependents of a deceased contributor, while Part II provides a lump sum payment.
20. Cf. pages 60 ff.
21. Conciliation File 190-2-7.
22. Cf. pages 59 ff.
23. Cf. pages 69 ff.
24. Cf. Chapter 1.
25. The groups are enumerated in Appendix C.
26. The distribution of occupational groups within the scientific and professional category would have to be determined after consultation with the parties.
27. That provision limits the period of retroactivity to the day on which notice to bargain collectively was given by either party.

Chapter 4

RESOLUTION OF INTEREST DISPUTES

162. Under the Public Service Staff Relations Act as it stands at present, a bargaining agent has the option of specifying, for each bargaining unit, one of two processes for the resolution of interest disputes: (a) reference to arbitration, or (b) reference to a conciliation board. Where the second of these processes is specified, the bargaining agent is entitled, ultimately, to call or authorize a strike and the employees may engage in a strike. There is little profit in discussing in philosophic and idealistic terms the question as to whether both techniques for resolving impasses in bargaining in public service should be retained.¹ Any such discussion is inevitably charged with emotional and almost quasi-theological overtones. At one end of the spectrum are those who maintain that under no circumstances should it be lawful for such impasses to be resolved, as they may be in the private sector, by resort to the strike, that compulsory arbitration should be the only avenue open to public servants who seek to improve their working conditions. At the other end are those to whom compulsory arbitration is anathema and who take the position that the right to strike is a basic human right which must not be abridged or attenuated in any way or under any circumstances. One could argue endlessly as to whether either of these positions is sound in principle.

Should the "Right to Strike" Be Retained in the Legislation?

163. Before turning to an examination of whether the legislation

should continue to enable public servants lawfully to engage in a strike, it may be of more than passing interest to point out that, with rare exceptions, while spokesmen for some groups who support compulsory arbitration of disputes in the public service declare that the terms and conditions of employment of public servants that could be achieved through that process should be on a par with those that obtain in the private sector, nevertheless, they usually seek to confine within narrow limits the scope of matters that should be subject to arbitration and even to bargaining. In short, with one breath they profess to have confidence in the competency of an arbitration tribunal to deal fairly with and do justice to public servants, and with the next breath they display a complete lack of confidence in the capability of the tribunal to deal with equal competency with many matters that affect the welfare of the employees concerned. Indeed they are inclined to confine the scope of bargaining for public servants within much narrower boundaries than those now provided for in the legislation.

164. To state the obvious, no method that can be devised to terminate disputes guarantees peace and it is a fact that outright prohibition of strikes by public servants has not prevented such strikes from taking place. Indeed, the view is held in some quarters that the prohibition of strikes may lull management into a false sense of security and, by egging labour on to defy the law and thereby prove its determination, it actually causes strikes.

165. In many jurisdictions, such prohibitions have rarely been enforced against unions that had the capacity to conduct effective strikes, or against their members. Indeed, in a number of instances, strikes

have been settled only on condition that legislation would be passed to grant amnesty to employees who did go on strike contrary to the law. Legal prohibitions against strikes by public employees that cannot be enforced with some degree of regularity and uniformity only serve to reveal government's irresolution, and even perhaps impotence, in banning strikes. They undermine respect for the law that prescribes the prohibitions and indeed for the whole administration of justice. The price is too high when people lose faith in the functioning of its institutions; there is much damage done to respect for law whenever a substantial group of people become scofflaws.

166. The express recognition in the Public Service Staff Relations Act that public servants may lawfully engage in strikes after having complied with certain pre-conditions was a highly innovative step. The number of lawful strikes in the Public Service, although it cannot be denied that those that have occurred have caused serious inconvenience, has been small, and experience has shown that strikes by public servants do not automatically and instantaneously endanger the community. I firmly believe, despite the impossibility of obtaining hard evidence to support the conclusion, that several of the strikes that did take place would have occurred even if the Public Service Staff Relations Act had not brought them within the range of lawful conduct. "The strike ... may serve ... as a catharsis ..."² Although it may be folly to prophesy - events make liars of us all - I venture to predict that the experience of the last few years and the adoption of a number of the recommendations in this report will lessen the likelihood of strikes of long duration occurring in the future. It may be well to spell out briefly

some of the considerations that have led me to this conclusion.

167. I suspect that employees in some bargaining units were so intoxicated with the new found "freedom" they had achieved with the passing of the Public Service Staff Relations Act that they could not resist the temptation of demonstrating their capacity to take advantage of it. Some no doubt expected the moon and could not readily bring themselves to accept reality. They may also have felt that they could bring the employer to its knees in short order if they engaged in a strike. That feeling of power has now been somewhat dissipated by what has actually occurred. The history of the negotiations between the Council of Postal Unions and the employer since 1967 is not without significance. In 1968, in the first round of bargaining relating to this bargaining unit, there was a twenty-one day strike; in 1970, the Council resorted to a limited type of strike - the rotating strike. In 1972, a settlement was reached without a strike being called by the Council. In case of the strike called by the Canadian Air Traffic Controllers Association in 1972, the dispute was ultimately settled by a joint reference to an arbitrator. These occurrences have undoubtedly had an effect on other public servants. There is also abroad in the land a sentiment that may be summed up in the phrase "there must be a better way." The strike is not outmoded, but there is a readiness in many quarters to cut down reliance on the strike as the ultimate weapon to resolve interest disputes.

168. To my mind, to outlaw strikes by public servants at this juncture would be counterproductive. We should go to great lengths to make the bargaining process work better. "The best way of resolving

impasses is to prevent them from arising."³ Then, if an impasse is reached, every possible step should be taken to encourage resort to arbitration, a technique whose time appears to have come. To compel public servants at this stage to rely solely on arbitration would tend to mobilize opposition to its use and would make of it in their eyes an evil to be avoided rather than a measure that might be looked upon as enabling employees to gain an equitable recognition of their needs without resort to disruptive action.⁴

169. I am confident also that the recommendations concerning the extension of the scope of bargaining and those concerning more adequate consultation on a number of other matters will contribute to a healthier bargaining atmosphere by eliminating some of the frustrations that arise because employees are denied the opportunity of participating in the decision-making process on matters that they regard as vital to their welfare, matters that are bargainable for their fellow employees in the private sector. Frustrations with regard to matters that are not bargainable tend to generate excessive demands in areas that are bargainable and lead to stratagems to achieve indirectly what cannot be attained directly.

Time for Specifying Dispute Resolution Process

170. A number of the bargaining agents urged me to recommend that the time for the specification of the dispute resolution process or an alteration in the process be advanced to the point of impasse, rather than be left as it is at present, namely, before notice to bargain can be given. The main argument advanced in support of such a change is

that, under the present arrangement, the employer gains an undue advantage in bargaining if the option selected is arbitration; it is said by the bargaining agents that, since the scope of arbitration is not identical with the scope of bargaining, the employer can arbitrarily refuse to bargain on non-arbitrable matters or use the threat of not making concessions on non-arbitrable matters to exert pressure on the bargaining agent to make concessions on arbitrable items. I am not prepared to say on the information that has come to my attention that the employer has resorted to such tactics to any measurable extent. Indeed, there have been instances in the last few years when the parties have continued to bargain and have reached agreement on non-arbitrable matters even after an award has been made by the Public Service Arbitration Tribunal and at a time when there was no legal compulsion on the employer to continue such bargaining. Nevertheless, the possibility of resort to the sort of tactics described earlier, if it has not occurred in the past, cannot be completely ruled out in the future. Some of what the bargaining agents regard as the inequities of the present situation could be cured by enlarging the scope of matters that are subject to arbitration. That is dealt with elsewhere in this chapter.⁵

171. The most cogent argument against the adoption of the approach advocated by the bargaining agents as to the time when the process is to be specified is the practical impossibility, from an administrative point of view, of adopting such a course in the near future, although that is not to say that it must be ruled out for all time. The statutory recognition that public servants may engage in a lawful strike after certain pre-conditions have been met is subject to the

limitation that, before such a strike can take place, indeed before a conciliation board can be established, a determination has to be made as to what persons are engaged in duties the performance of which is essential in what I shall refer to for present purposes as the public interest. These employees are described in the Act as "designated employees." If the employer and the bargaining agent are unable to agree as to which employees are to be designated, the task of making the necessary determination falls upon the Board. Experience has shown that the task is arduous and time consuming. At the present time, with the specification of the dispute resolution process being made by the bargaining agent before notice to bargain is given, the Board may be called upon to participate in the designation process only with respect to the bargaining units for which the conciliation board route has been specified by the **certified bargaining agent**. The Board lacks the resources, and would continue to lack the resources even in its restructured form, in accordance with recommendations made in Chapter 7, to deal expeditiously in the immediately foreseeable future with any significant increase in the number of instances in which it would have to determine which employees are to be designated. I am firmly convinced that the approach advocated by the bargaining agents would increase the workload of the Board to an intolerable extent. Some of the bargaining agents have suggested that the fears I have expressed on this score are highly exaggerated. I shall therefore proceed to examine the problem and their arguments in greater detail.

172. There are presently 108 operating bargaining units. Potentially, the Board might have to contend with objections in all 108

units, probably roughly within a two-year cycle having regard to the pattern of collective bargaining that has emerged since 1967. The bargaining agents contend that most bargaining units would remain under the arbitration option and the Board would be spared the ordeal of dealing with designations in such units. The short answer is that, if bargaining agents can specify the conciliation board route for any bargaining unit at the point of impasse, the designation process must be engaged in and completed for that unit before an impasse is reached. It would be an intolerable situation for employees in a bargaining unit to be put in a position where an impasse in bargaining is reached and then be told, because the designation process is still incomplete, that no conciliation board can be established and they must go into a state of suspense for an indefinite period. The likely consequences need scarcely be spelled out for any person who has any acquaintance with the industrial relations scene.

173. To meet some of the difficulties I have envisaged, some bargaining agents have advocated that they be required at some point of time either to give a firm commitment as to their choice of a dispute resolution process or to inform the Board that they reserve their right to specify the option at the point of impasse. It is implicit in this proposal that, since the employees in many bargaining units will have no desire to follow the conciliation board route, the bargaining agents for those bargaining units will continue to specify arbitration. The number of units for which a bargaining agent would reserve its right, it is said, would be relatively small and, in the result, the burden under which the Board would labour would be brought within manageable

proportions. While at first glance the proposal has an appeal, it is likely, human nature being what it is and the bargaining agents being political institutions, that the temptation to ascertain who is designated, as with the contents of Pandora's box, would prove highly irresistible; a bargaining agent and its members would have nothing to lose and perhaps everything to gain by retaining the right to specify the option at the point of impasse.

174. There also appears to be an impression among some bargaining agents that, once the Board has made a determination as to which employees in any bargaining unit are to be designated, the conclusions reached by the Board in respect of that unit reduce, if they do not completely eliminate, the need to start from square one in the designation process preceding succeeding rounds of bargaining. This impression is not supported by the facts. There are close to 100 bargaining units in which the designation process has not yet been fully carried out on even one occasion and there is no available yardstick to indicate what the dimensions of the task may be. In addition, even where the designation process has been carried through in previous rounds of bargaining, the experience has been that the employer is inclined to increase the number of employees it proposes to designate and the resistance of the bargaining agent to the designation even of those who have been previously designated is growing. In short, the workload of the Board in this area is not likely to diminish and indeed might well expand, even under the present plan of designation, as the parties become more sophisticated in their analysis of the issues involved and as each of them strives to bend to its advantage every principle that

the Board may establish in its reasons for decision on designation.

175. In these circumstances, it appears to me that it would be foolhardy to recommend that the specification of the dispute resolution process be advanced at this time to the point where an impasse has arisen. However, a number of recommendations are made in paragraphs 182 to 191 with a view to rendering the designation process more efficient and effective.

Notice to Bargain and Its Concomitants

176. An improvement in the climate of bargaining may be forecast as likely to come about through the broadening of the scope of bargaining. In addition, there are certain procedural and other changes that are called for if the desired objective of making the bargaining process work better is to be achieved.

177. The legal obligation to commence bargaining becomes operative upon the service of notice to bargain. Paragraph 49(2)(b) of the Public Service Staff Relations Act provides that, in the case of bargaining for the renewal or revision of a collective agreement, notice to bargain may be given within the period of two months before a collective agreement or arbitral award ceases to operate. Subsection 147(1) of the new Canada Labour Code⁶ extends the notice period to three months or such extended period as may be provided for in a collective agreement. It is recommended that paragraph 49(2)(b) of the Public Service Staff Relations Act be amended to conform to the provisions of the Canada Labour Code. The giving of notice at an earlier date than is presently permitted should go some way to reduce the irritation that develops

because of the hiatus that now often occurs between the expiry date of an agreement and the renewal thereof.

178. The Board should be authorized to require a copy of the notice to bargain to be sent to the Secretary of the Public Service Staff Relations Board. This would make it possible for the Secretary to keep in touch with the situation so as to enable the Chairman of the Board to ascertain when conciliation services should be offered to the parties. It is also recommended that there be added a provision similar to section 204 of the Canada Labour Code to require each party to a collective agreement, forthwith upon its execution, to file one copy of the collective agreement with the Board.

179. Section 51 of the Public Service Staff Relations Act provides that, where notice to bargain collectively has been given, existing terms and conditions of employment, applicable to employees in the bargaining unit in respect of which the notice was given, that may be embodied in a collective agreement remain in force during what may be described for convenience as the period during which the bargaining process is being carried out. The purpose of such a provision is to prevent one party, usually the employer, from making alterations in the terms that would have the effect of compelling the other party to retrieve the conditions that formerly applied. Such a provision is usually regarded as a quid pro quo for the prohibition on resorting to a strike during the period. Under the legislation as it stands, existing terms and conditions can be altered during this period only on consent of the parties. In a service as complex and wide-spread as the Public Service of Canada this restriction may seriously undermine

the capacity of the employer to effect necessary changes in its operations. There is scarcely any time during the year that the employer is not bargaining with a bargaining agent for employees in some bargaining unit. If changes in terms and conditions for one or more units, which the employer would be entitled to make at a given time, also affect the terms and conditions for another unit, with respect to which notice to bargain has been given, the employer is now prevented by section 51 of the Public Service Staff Relations Act from making the changes with regard to the first mentioned unit or units. It is therefore recommended that section 51 be amended to empower the Board to permit the employer to alter terms and conditions of employment for employees in a bargaining unit with respect to which notice to bargain has been given, where the bar that might otherwise be created by section 51 would make it impossible to introduce such alterations for another unit or units. The amended provision should empower the Board in its discretion to attach conditions to the permission it grants in such circumstances.

Conciliation

180. Section 52 of the Public Service Staff Relations Act gives to the Chairman of the Public Service Staff Relations Board a discretion to appoint a conciliator to assist the parties in reaching agreement. However, the appointment of such an officer can presently be made only where one of the parties advises the Board that it desires the assistance of a conciliator. A request for the appointment of a conciliator by one of the parties may, in some circumstances, be construed by the other as indicating that the requesting party has something more to

concede. A party may therefore be reluctant to make a request and yet the situation may be such that a conciliator can play an important auxiliary role.

181. It would appear to be desirable to give the Chairman authority to appoint a conciliator, not only at the request of a party, but also on his own initiative. To give some assurance to the parties that the Chairman will not inject a conciliator into their bargaining at a time when to do so would be detrimental to their interests, such an appointment, in the absence of a request by one of the parties, should be made only after the Chairman has consulted both parties and each of them has had an opportunity of making known to him its views as to the desirability of having a conciliator intervene. The Chairman should be empowered to make such an appointment even after a request for arbitration or for the establishment of a conciliation board has been received. In the latter event, the appointment of a conciliator should be for a limited period of 14 days, subject to the time being extended (a) on consent of the parties, or (b) by the Chairman but only for an additional period not in excess of 14 days and even then only after consultation with the parties. It is also recommended that there be vested in the Chairman of the Public Service Staff Relations Board authority, similar to that vested in the Minister of Labour by section 195 of the Canada Labour Code,⁷ to appoint, after consultation with the parties, a person to assist the parties in settling any dispute or difference.

Procedure for Determination of Designated Employees

182. Under the legislation as it stands, the employer may be

required to furnish to a bargaining agent, at two different points of time, a statement of the employees or classes of employees whose duties consist in whole or in part of duties, the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public. These employees are referred to in the Act as "designated employees." The first occasion on which such a statement may be required is before a bargaining agent specifies the dispute resolution process applicable to a particular bargaining unit; the purpose of requesting the statement is to facilitate the specification, or an alteration in the specification, of the dispute resolution process for the unit. This statement may be described as a preliminary statement and is for information only, i.e., there is no procedure whereby a bargaining agent may challenge before the Board the accuracy of this statement. If the bargaining agent specifies reference to a conciliation board as the dispute resolution process, the employer is required to furnish to the Board and to the bargaining agent concerned, within 20 days after notice to bargain has been given, what might be described as a definitive statement of the employees or classes of employees it considers to be designated employees.

183. Under the P.S.S.R.B. Regulations and Rules of Procedure, the bargaining agent has 20 days after the statement has been furnished to file with the Board a notice that it objects to the statement of the employer in whole or in part. Where an objection has been filed, the parties enter into consultation regarding the statement and these consultations usually continue for some period of time. It is only if they fail to reach an understanding that the Board is called upon to deal with

the proposed designations that have been objected to by the bargaining agent. Throughout this period the parties have also been engaged in bargaining on the terms and conditions to be included in the forthcoming collective agreement. Even with the officers of the Board exerting considerable pressure on the parties to dispose of the designated-employees question, it has generally been the case that the parties are not in a position to present evidence to the Board with regard to the designations objected to until the bargaining is heading to an impasse. The presentation of evidence and argument to enable the Board to make a determination on designations then must be rushed to a speedy conclusion. This situation does not lend itself to careful and adequate presentation of evidence or the careful and adequate consideration by the Board of the issues that are raised, especially since, under subsection 79(1), no conciliation board can be established for the dispute until the designation process has been completed.

184. It has been suggested that this undesirable state of affairs could be eliminated by treating the preliminary statement as the definitive statement. If a preliminary list is requested in contemplation of an alteration of the specification of the dispute resolution process, it may have little significance unless it is closely related in time to the date on which an alteration may be recorded under the P.S.S.R.B. Regulations and Rules of Procedure. It would therefore appear to be preferable to fix in the Act itself a date for the submission by the employer of a definitive proposal as to designated employees which would be sufficiently early to enable the designation process to be completed in all but extraordinary circumstances before

an impasse in negotiations is reached and yet sufficiently late to make it possible to submit a reasonably current list. It should be borne in mind that the organization of the Public Service is highly flexible and subject to constant change. It is my view that a date six months before the expiry of the collective agreement or arbitral award would meet the needs of the situation. It is therefore recommended that a bargaining agent that opts for the conciliation board route should be entitled to require the employer's statement of designated employees to be furnished six months before the date of expiry of the agreement or arbitral award, as the case may be.

185. The foregoing recommendation would also make it necessary to provide that a bargaining agent that has not previously opted for the conciliation board route would have to record an alteration in the process not less than six months before the expiry of the applicable collective agreement or arbitral award. To bar a premature alteration being made in the heat of a controversy relating to the last agreement, it is recommended that such an alteration should not be made more than eight months before the expiry of the applicable agreement or arbitral award.

186. If these recommendations are accepted, there would be little need to provide for a separate preliminary list, since for all practical purposes the definitive statement would serve all purposes. It may be argued that the elimination of the opportunity to examine a preliminary list might make it hazardous for a bargaining agent that had previously specified the arbitration process to determine whether it should alter the specification, since it could not ascertain in advance what the

employer had in mind by way of designating employees in the unit concerned. I am not persuaded that the information in the preliminary lists that have been furnished subsequent to the initial certification period has been of such a nature that it has had any significant impact on the decision taken by the bargaining agent or the employees in the bargaining unit as to which dispute resolution process they preferred.

187. Since the differences between the parties as to which employees are to be designated are not likely to be resolved until after the bargaining agent has been required to specify which dispute resolution process is to be applicable to a given bargaining unit, the list of designated employees as finally established may make it unrealistic for the bargaining agent to resort to a strike. It is therefore recommended that if, either by agreement of the parties or by determination of the Board, more than 50% of the employees in a bargaining unit are ultimately designated,⁸ the bargaining agent should be permitted, subject to consent in that regard being given by the Board, to alter its specification from reference to a conciliation board to reference to arbitration. Such an alteration should be made not later than 10 days after the list of designated employees is officially established, or such longer period as the parties may agree in writing.

188. The early submission of the statement of designated employees suggested in the foregoing recommendation may produce a situation where the statement may not accurately reflect the circumstances that will obtain at the time a strike occurs; some employees leave, or equipment is changed, or new conditions may arise or come to light. To meet this situation, it is recommended that the employer should be permitted to

submit additional statements of designated employees at any time, but that, if the Board has not completed its processing of these additional lists before a request for the establishment of a conciliation board is received, the establishment of the board should not be held up. It is also recommended that an additional safeguard be built into the submission of such additional lists by providing that the Board could attach to any permission it gives for the submission of such additional lists such conditions as it may deem appropriate. This safeguard is necessary to ensure against neglect or abuse. There have been some instances of neglect in the past.

189. In ascertaining what employees should be proposed for designation, the employer must engage in some measure of speculation.⁹ The experience of the employer in dealing with strikes is very limited and it is difficult to foresee what emergencies may come to light under actual strike conditions, some of which will become apparent only if the strike continues for any length of time. Under subsection 79(2) of the Act as it stands, it is impossible for the Board to designate an employee in an emergency situation with any degree of despatch. It is therefore recommended that, after a strike has commenced, any member of the Board assigned for the purpose may issue an order designating an employee for a short interim period on the presentation to him, ex parte, if necessary, of sworn testimony either written or oral, the hearing on the merits to take place at the earliest possible opportunity thereafter.

190. The rationale for the designation of employees under subsection 79(1) of the Act is that employees who would otherwise be

entitled to engage in a strike, where they are in a bargaining unit for which the bargaining agent has specified the conciliation board as the dispute resolution process, must refrain from striking because their remaining at work is essential to the safety or security of the public. In some cases, all the duties of an employee are of an essential character. In others only part of the duties of an employee may be essential to public safety or security, or the performance of the essential duties is of an intermittent nature. Taking these circumstances into account, the parties have at times agreed to designate employees on what may be described as a conditional basis and the Board has also determined that some employees should be treated as being designated only if certain conditions arise. Thus, for example, a designated employee may be required to perform only part of his regular duties, or to perform duties at certain intervals, or to meet a specified emergency, or to keep specified equipment in a functional state. Questions may arise, and indeed have arisen, as to whether the conditions under which the duties are to be performed are being observed by management or by the employee. It is recommended that if an employee is designated to perform duties on a conditional basis and he alleges that the conditions have been violated, he should be required to perform the duties assigned to him, but his objection should be reported forthwith to the Board by or on behalf of the employee concerned. It should be declared to be a prohibited practice for anyone to interfere with an attempt of the employee to communicate with the Board in such circumstances or unreasonably to refuse to permit an employee to use available facilities for such communication. Upon

a complaint to the Board that an agent of the employer has directed a designated employee to perform duties other than those required of him by the designation, a member of the Board, after consulting with the parties, would, in a proper case, issue an interim order with regard to the performance of the duties assigned to the employee and would schedule a hearing of the allegation at the earliest possible time. If it were established that the employee was required, notwithstanding his objections, to perform duties that did not meet the condition on which he was designated, the Board could order that the employee be compensated in an amount not in excess of five times his daily rate for each day on which the condition was not observed.

191. In several cases that have come before the Board in relation to the designation of employees under section 79 of the Act, the question has arisen as to the remuneration to be paid to designated employees not required to perform the full range of duties they normally perform. The Board has held¹⁰ that, under the present legislation, it has no authority to issue any directive as to the amount of compensation to be paid to such employees. It is recommended that the parties should consult on the matter and, if they are unable to agree, the Board should be empowered to make an appropriate ruling.

192. It has been suggested to me that, at times when a vote to ratify an agreement is being taken, designated employees who remain at work and draw their salary during the strike (and therefore have nothing to lose) may vote against the ratification of an agreement in the hope that a prolongation of the strike may produce more favourable terms. I am not prepared to recommend that designated employees be forbidden

to participate in such a vote, but it seems to me that the several employee organizations concerned might look into the situation with a view to ascertaining whether such designated employees are in a position to take undue advantage of the circumstances in which they find themselves.

193. One additional matter relating to the designation of employees calls for attention. Under subsection 79(1) of the Act, no conciliation board shall be established for the investigation and conciliation of a dispute in respect of a bargaining unit until the parties have agreed on, or the Board has determined, the employees who are to be designated. However, subsection 78(1) declares that the Chairman of the Public Service Staff Relations Board may refuse to establish a conciliation board where "it appears to him, after consultation with each of the parties, that the establishment of such a board is unlikely to serve the purpose of assisting the parties in reaching agreement." In that case, the Chairman is required forthwith to notify the parties in writing of his intention not to establish such a board. Where a conciliation board is established, a strike is forbidden until seven days have elapsed from the receipt by the Chairman of the report of the conciliation board. On the other hand, if the Chairman were to notify the parties pursuant to section 78 of his intention not to establish a conciliation board, the employees in the bargaining unit concerned could lawfully engage in a strike immediately upon such notice having been given. As the legislation stands, it is conceivable that the parties might not have been able to agree on the employees to be designated and the Board might not have disposed of a proceeding

relating to the designation of employees at the time the Chairman notified the parties of his intention not to establish a conciliation board. It is recommended that provision be made that the Chairman should not be entitled to notify the parties of his intention not to establish a conciliation board, where he reaches the conclusion that the establishment of such a board is unlikely to serve the purpose of assisting the parties in reaching agreement, until after the process relating to designation has been completed.

Conciliation Boards

194. Under the present legislation, where a bargaining agent has opted for reference to a conciliation board as the dispute resolution process and an impasse in bargaining has been reached, either party may apply to the Chairman of the Public Service Staff Relations Board to appoint a conciliator or it may, without first seeking such an appointment, request the establishment of a conciliation board. Section 77 of the Act sets up, as a pre-condition to such a request being made, the requirement that "the parties ... have bargained in good faith with a view to concluding a collective agreement." Authority to establish a conciliation board is vested in the Chairman of the Public Service Staff Relations Board. A question has recently arisen as to whether the issue of non-compliance with the pre-condition of good faith bargaining by the party requesting the establishment of a conciliation board can be raised before the Public Service Staff Relations Board on a complaint, or before the Chairman of that Board as persona designata. The further question has been raised as to the authority of either the Board or the Chairman to provide appropriate

relief if it is found that the requesting party has indeed failed to bargain in good faith. To clarify the situation, it is recommended that the legislation should make it possible for the issue of good faith bargaining to be raised before the Board and that the Board should have exclusive authority, if it finds a requesting party at fault, to postpone the granting of the request until the pre-condition has been met.

195. The Canada Labour Code¹¹ empowers the Minister of Labour to appoint a conciliation commissioner in place of a tri-partite conciliation board. This provision recognizes that there may be situations where the appointment of a single commissioner is preferable to a three-man tribunal. It is recommended that similar powers be vested in the Chairman of the Public Service Staff Relations Board, but with the qualification that the appointment of a conciliation commissioner could be made only after consultation with the parties.

196. Section 83 of the Public Service Staff Relations Act directs the Chairman of the Public Service Staff Relations Board to deliver to a conciliation board a statement setting forth the matters on which the conciliation board is to report its findings and recommendations. A like provision is commonly found in labour relations statutes in Canada. However, the practice as to the preparation and substance of this statement under the Public Service Staff Relations Act differs from that observed in other jurisdictions, the reason being that under the Public Service Staff Relations Act there is a limited scope of bargaining and the authority of the conciliation board is also limited. In the preparation of the statement, the Chairman of the Public Service

Staff Relations Board is called upon to make decisions on the meaning and application both of the Public Service Staff Relations Act itself and other relevant statutes as well. Circumstances may well arise where there is an issue of law on which the Chairman must make a decision, without the participation of his colleagues, and the same point may come before the Board on a complaint alleging failure to bargain in good faith. This situation may conceivably lead to a conflict between a decision of the Chairman and a decision of the Board. It is recommended that this state of affairs should be avoided by transferring to the Board authority to deliver terms of reference to a conciliation board.

197. Subsection 86(2) precludes a conciliation board from including in its report any recommendation on matters not subject to bargaining by virtue of subsection 56(2). Subsection 86(3) lists a number of specified matters on which a conciliation board may not report, i.e., the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees. Some of these matters would continue to fall within the protection afforded by subsection 56(2) of the Act as this subsection would be amended in line with the recommendations set out in this report; others would be dealt with in the Act itself. Some aspects of the topics listed in subsection 86(3) would become bargainable. It is recommended that appropriate changes be made in the subsection to reflect this situation.

198. It is conventional for the parties to return to the bargaining table after the release to them of the report of a

conciliation board and to resume bargaining with a view to reaching agreement. The retention of the right to strike in the Public Service makes it imperative to assure the public that every effort has been made to effect a settlement of a dispute before a strike occurs. It therefore appears to be desirable to have the legislation declare that there is an obligation on the parties to renew their negotiations after the release of the report of the conciliation board. Such a report may usually be expected to provide for the parties a new point of departure for negotiations and the resolution of their dispute. It is recommended that the time frame for the renewed bargaining be limited to 14 days from the release to the parties of the report of the conciliation board, or such longer period as they may agree upon.

Strikes

199. A bargaining agent that has specified the conciliation board route as the dispute resolution process for a bargaining unit is entitled to call or authorize a strike of the employees in the bargaining unit, and the employees in the bargaining unit are entitled to engage in a strike, when seven days have elapsed from the **release to the parties of the report of the conciliation board**. In line with the **recommendation in paragraph 198**, the seven-day period should be **enlarged to 14 days**.

200. Subsection 79(5) of the Act provides that all employees in a bargaining unit who are agreed by the parties or determined by the Board to be designated employees must be so informed by the Board within such time and in such manner as the Board may prescribe. It has been the practice of the Board to require the employer to file a "name list"

of designated employees accompanied by the work station and last known address of each such employee not later than the fifth day after

- (a) the employer requests the Chairman in writing to establish a conciliation board, or
- (b) the Secretary of the Board serves upon the employer a notice of the request from the bargaining agent to the Chairman to establish a conciliation board, or
- (c) the Chairman notifies the parties of his intention to establish a conciliation board under subsection 78(2) of the Act,

as the case may be. Upon receipt of such a name list, the Registrar of the Board notifies each designated employee by registered mail of the fact that he has been designated and of the conditions under which he is required to perform "essential" services if a strike were to take place. The time taken in carrying out this process depends on the geographic distribution of the employees and their location - they may be at isolated places. It will be noted that this procedure contemplates a conciliation board being established and the necessary process of notification being carried out well before the conciliation board has presented its report. As was pointed out in paragraph 193, if the Chairman of the Public Service Staff Relations Board were to notify the parties of his intention not to appoint a conciliation board, a strike could lawfully take place as soon as the parties have been notified of the Chairman's intention. If this provision were to remain unaltered, it might be impossible in some circumstances to give timely notice to designated employees. It is therefore recommended that subparagraph 101(2)(b)(i) of the Act be amended to provide that no strike should be lawful, where the Chairman notifies the parties that

a conciliation board will not be established, until the expiration of 21 days from the date of the Chairman's notice to the parties.

201. There is a limitation on the right to strike that I am impelled to recommend, after having given the matter careful consideration. It is a limitation that is based on the exclusive right vested in the bargaining agent under the legislation to bargain collectively on behalf of the employees in an appropriate bargaining unit and to bind them by a collective agreement until its certification in respect of the bargaining unit is revoked. It is recommended that employees should not be entitled to engage in a strike unless the strike has been duly called or authorized by the certified bargaining agent - the organization that the employees have freely chosen to represent them. If employees are dissatisfied with the action or lack of action in bargaining on the part of their bargaining agent, they are entitled to seek to have the certification issued to that organization in respect of them revoked. However, so long as a particular employee organization continues to be entitled to represent them in collective bargaining, it is my view that no dissident group of employees in the bargaining unit should be permitted to usurp the exclusive authority vested in the bargaining agent alone. It is further recommended that, in order to provide clear proof that a strike has been called or authorized by the bargaining agent, the responsible officers of the bargaining agent should be required to file with the Secretary of the Board, before the strike commences, a statement verifying the fact that a strike has been called or authorized and setting forth the date when strike action is to commence.

202. I also recommend that there be included in the legislation, a provision, similar to that which has been included in the Canada Labour Code,¹² empowering the Board to suspend the right to strike during the period between Parliaments, if the strike, in the opinion of the Board, would adversely affect the national interest if it occurred.

203. Reference¹³ has already been made to the classes of employees described in the Act as designated employees, i.e., employees the performance of whose duties is necessary in the interest of the safety or security of the public. The phrase safety or security of the public has been construed to cover employees the withdrawal of whose services would pose an imminent threat to the health of members of the public or would jeopardize the conduct of long term experiments directly related to the preservation of the safety, security or health of the public. To provide assurance to the public on this score and to avoid controversy, it is recommended that this construction be embodied in subsection 79(1) of the Act in express words.

204. There is also an additional consideration in dealing with strikes in the Public Service. A distinction must be drawn between impeding the capacity of the employer to carry on its normal business during the course of a strike, no matter how costly in terms of money and convenience that may be, and impeding the capacity of the employer to restore services to the public once the strike is over. Again, there are some facilities and equipment and national treasures and so on which might be irreparably damaged because of the cessation of work by employees in a bargaining unit. The non-performance of duties in the

course of a strike that inflicts continuing harm of a serious nature after the strike is ended cannot be of benefit to the employees, let alone the public or the employer. From my observation of what has occurred in the Public Service since collective bargaining legislation came into force, it is fair to say that employee organizations, on the whole, have displayed a high sense of responsibility in this regard by agreeing to the designation of some employees who, on a literal reading of the phrase, could not be regarded as performing duties essential to the safety or security of the public. They have also been prepared, as an indication of their concern for the welfare of the public, to give undertakings to the employer that, in the event of a strike, some non-designated employees would perform some duties that could not be characterized as essential to safety or security of the public. There is no way in which such an undertaking by a bargaining agent can be enforced under the legislation as it stands, either against the bargaining agent or against employees if they refuse to carry out an undertaking given by the bargaining agent. The giving of undertakings of this nature should be encouraged. To this end, it is recommended that where

- (a) a bargaining agent gives an undertaking to be filed with the Board that certain identified employees will continue to perform the full range of their duties or any specified portions thereof, the nature of which duties are spelled out in writing, and
- (b) the parties agree that the employees to whom the undertaking applies are not otherwise subject to designation,

the employees concerned should be deemed to be designated employees

subject to all restrictions that apply to designated employees. The bargaining agent should not be entitled to withdraw the undertaking except,

- (a) on 20 days written notice to the employer,
and
- (b) only with the consent of the Board and on
such terms and conditions as the Board may
determine.

205. The sections of the Act relating to procedures for dealing with unlawful strikes should be strengthened. The provisions authorizing the Board to make a declaration that a strike is unlawful, a procedure that originated in Ontario and has proved very effective under the Ontario Labour Relations Act, have been less than satisfactory in the federal Public Service for a number of reasons. The fact that the Board is presently composed largely of members who serve on a part-time basis militates against expeditious action on applications for a declaration and speed is of the essence if the procedure is to have value. One can forecast with a great deal of confidence that, if the recommendations contained in Chapter 7 for the restructuring of the Board are accepted, it will be possible for the Board to deal with such cases so that a hearing can take place and a decision rendered while the strike is still in progress or within days after the employees have returned to work, i.e., at a time when a decision can have the greatest impact on the situation, rather than at some date remote from the occurrence that gave rise to the application.

206. There is also another aspect of the process under the

legislation as it stands that leaves something to be desired. Under the relevant provisions of the statute, a declaration may be issued by the Board only where the unlawful strike is called or authorized by an employee organization. The applicable legislation is so worded that the Board cannot issue a strike declaration where the unlawful strike has been called or authorized by a subdivision of an employee organization. In several of the applications for a declaration that have come before the Board, there appears to have been sufficient evidence to support a finding that a subdivision called or authorized an unlawful strike, but there was nothing to show that the parent body was guilty of wrongdoing. Under the Ontario Labour Relations Act,¹⁴ on which, as was pointed out in paragraph 205, the provision here under consideration was modeled, subordinate bodies of parent organizations, such as branches or locals, with rare exceptions, fall within the definition of the term "trade union" and they are therefore legal entities with respect to which a declaration may be issued. It is recommended that the relevant provisions of the Public Service Staff Relations Act be amended to ensure that the Board may make a declaration not only where the parent employee organization is itself at fault, but also if the strike is called or authorized by any subordinate segment¹⁵ of the parent organization. It is also recommended that, for these purposes, the segment be deemed a legal entity subject to processes before the Board. A similar alteration should also be made in the sections relating to prosecutions to ensure that a subordinate segment be subject to prosecution if it calls or authorizes an unlawful strike.

207. Wildcat strikes by groups of employees do occur from time to time without the consent or approval, either tacit or otherwise, of the officers of an organization. It is recommended that the legislation should authorize the Board to issue a strike declaration where employees have engaged in an unlawful strike, even if there is no evidence of participation therein by the officers of the organization or that they condoned the unlawful action.

208. It is also recommended that every collective agreement should include a clause whereby the bargaining agent would bind itself not to call or authorize a strike during the lifetime of a collective agreement and that, in default of the parties including such a clause, the Board could formulate such a clause for them which should be deemed to be incorporated in the collective agreement. Many collective agreements in the private sector contain such a provision and there is statutory precedent elsewhere for the inclusion of a provision of this nature in the legislation. Not only does the embodying of such a clause in the document which records the meeting of the minds of the two parties have a desirable psychological effect on the employees which should not be underestimated, but it also affords an opportunity for seeking a "civil" remedy through the grievance procedure where an unlawful strike takes place and thus reduces the need to resort to the "criminal" law.

209. From time to time employees who are not lawfully entitled to engage in a strike set up picket lines, ostensibly for the purpose of informing the public of their dissatisfaction with certain conditions, but with the conviction that other employees will feel a moral or

social obligation not to cross the picket line. Unless the latter employees are "protected" by an appropriate provision of the collective agreement applicable to them, they may be subject to disciplinary action and, in some instances, to prosecution for failing to report for work. No matter what views one may hold as to the validity of what trade unionists commonly regard as an obligation to respect a picket line, those who do observe it may suffer the consequences for their conduct, while those who created the conditions which led to withdrawal of services by employees other than those who manned the picket line may "escape scot free," e.g., if they themselves were not required to be on duty at the relevant times. To rectify this inequity, it is recommended that there be included among the prohibited practices a provision that no employee should do any act if he knows or ought to know that the probable and reasonable consequence of the act, would be to cause another employee or employees to engage in an unlawful strike. However, such a prohibition should not apply to any action taken in connection with a lawful strike.

210. The most desirable sanction behind any law should be one that induces citizens to obey the law rather than to punish them for disobedience. Especially in the law governing the relations between the employers and employees, criminal sanctions should be used only as a last, and perhaps desperate, recourse when all else has failed. The deterrent effect of fines in labour relations is minimal. Consequently, I do not recommend that the fines provided under the Public Service Staff Relations Act should be increased in severity, with one exception. That exception is in the case of strikes by employees who have been

designated as performing duties necessary to the safety and security of the public. No distinction is drawn in the present legislation between the legal consequences of an offence by such employees and the consequences of an offence by employees not engaged in such essential duties. The quality of the offence in the case of strikes by employees performing essential duties should be made more evident than it is under the present provision; authority should be conferred upon the courts to impose a fine for each day that such an employee is on strike. In addition, it is recommended that the failure of a designated employee to perform the duties required of him, without an adequate excuse, should be an offence, whether the withholding of the services is done on his sole initiative or in concert with others.

Lockout

211. Under the general labour relations legislation, the corollary of the employees' right to strike is the employer's right to lock out his employees. No lockout provision is to be found in the Public Service Staff Relations Act. Indeed, the Board has held¹⁶ that a retaliatory lay-off of employees who engaged in a rotating strike in the Post Office would constitute an infringement of the unfair practices section of the Act. It is unlikely that a public service employer would lock out its employees with a view to compelling them to agree to terms and conditions of employment. However, where employees engage in a rotating strike or in action that does not involve a complete cessation of work, the employer may well regard a retaliatory lockout of the employees in the bargaining unit to be an effective weapon to minimize the impact of such a strike. There does not appear to be any

justification for depriving the employer of this weapon. It is therefore recommended that provisions be included in the legislation authorizing the employer to lock out employees in the same circumstances and subject to the same limitations as apply in the case of a lawful strike. Provision would have to be made for the issue by the Board in appropriate circumstances of a declaration that a lockout is unlawful. Provision would also have to be made for prosecution on consent given by the Board of an officer of the employer who locks out employees or who counsels or procures an unlawful lockout and for the inclusion of a clause in a collective agreement prohibiting an unlawful lockout.

Arbitration of Interest Disputes

212. Procedural problems: It would be desirable to introduce a number of procedural changes in the arbitral process. Section 59 and subsection 63(1) of the Act speak of the pre-condition to a reference to arbitration that the parties "have bargained collectively in good faith." The comments and recommendations made in paragraph 194 of this report in connection with a similar problem concerning a request for the establishment of a conciliation board are equally applicable here.

213. Under section 63 of the Act, the party requesting arbitration is required to specify in the request the matters in respect of which it seeks arbitration and, under section 64, the responding party is entitled to specify any additional matters to be referred to arbitration. Since both specifications must be made within fixed statutory time limits, the parties are bound by their original specifications and it is technically impossible to repair an oversight. It is recommended that

the procedure be made more flexible so that the parties would be entitled to amend their specification of the items to be dealt with on arbitration but, to prevent abuse of the process, the amendment should only be made with the consent of the Board and on such terms and conditions as the Board may determine.

214. One of the basic premises that underlies the availability in the Act of arbitration as a dispute resolution process is that the parties will reach agreement on most of the matters that are in dispute and that they will refer to arbitration only a few with regard to which their positions are irreconcilable. To accommodate this premise, the Act contemplates that the parties will not only reach agreement on many items but will incorporate these items in a collective agreement; the Act calls for a copy of such an agreement to be appended to the notice of reference to arbitration. In practice, it is not uncommon for the parties to arrive at a consensus on certain matters and to initial papers evidencing that consensus, but not to embody anything in a document that has the validity of a collective agreement. They then refer to arbitration only those matters on which they are still in dispute. At times, they may even reserve some matters to be settled between themselves after the arbitral award has been issued and perhaps even to be negotiated in light of the terms of the award. In most cases where the parties have proceeded in this fashion, no difficulty has ensued. However, there have been instances where the prior consensus has broken down or where the parties have not been able to resolve their differences on matters they had left for later consideration. It is recommended, therefore, that where matters have

been tentatively agreed upon prior to reference to arbitration or left for subsequent negotiation, where notice of the understandings reached is filed with the Board on the reference to arbitration, and the parties have not been able to arrive at a mutually satisfactory conclusion with regard to these matters, either party should be entitled to make a further reference to arbitration on arbitrable items, but such further reference should be made not later than 30 days after the issue of the arbitral award or such further time as the parties may agree upon.

215. Scope of arbitrable matters: A number of bargaining agents have argued in their representations to me, that every matter that is bargainable should also be a matter which a party should be entitled to refer to arbitration if bargaining does not produce the desired result. The issues that remain in dispute, it is said, could be determined by a tribunal which would award to each of the parties to bargaining, on the basis of merit, what it should have obtained through the bargaining process had reason and common sense permeated their negotiations. This line of reasoning, although persuasive at the level of generality, ignores a number of fundamental characteristics of the bargaining process as it operates in general and especially in a public service context.

216. Collective bargaining is basically a power struggle.¹⁷
In connection with the confrontation at the bargaining table, a visual aspect of the struggle, as the report of the Task Force on Industrial Relations points out,

groups of employees must work out a multitude of trade-offs among themselves before and during negotiations. Through their union they must establish

priorities while attempting to resolve their collective differences with management. The resolution of their internal trade-offs is as essential to the success of the industrial relations system as is the resolution of disputes between the parties.¹⁸

When the end process for resolution of disputes is the strike weapon, the employee organization concerned must make hard-nosed compromises between the claims of conflicting groups in light of the risks involved. If everything bargainable is also arbitrable, there are no risks, or only very minimal risks, involved in throwing every issue, no matter how insignificant it may be, into the lap of the arbitrator. There is no inducement to the leadership of an organization to resist political pressure and it is therefore all the more likely to yield to the wishes of every small group of employees. Indeed, when an impasse is reached, an employee organization may be forced to refrain from indicating to the arbitrator that it was prepared to trade off certain terms, or even to repudiate any trade-offs it may have made, in the course of the bargaining that preceded arbitration. The result could be chaotic not only because of the intolerable burden that would be cast on the arbitration mechanism, but also because it would negate the fundamental philosophy of a collective bargaining system, which is that an agreement entered into by the parties themselves is vastly superior to an award forced on them by a third party, no matter how wise or all-knowing that third party may be.

217. Another factor that must be taken into account is that there is an essential difference between the capability of the public employer to tolerate an unfavourable arbitral award in certain areas and that of the private employer to resist an unduly burdensome settlement.

A trade union bargaining with a private employer is constantly aware that the sword of Damocles hangs over its head. It conducts its bargaining with the knowledge that, at some point, if it does not yield, the employer may be driven to shut down his operation. No similar inhibition need deter the employee organization that deals with the public employer. The services rendered by the employer, as government, cannot be discontinued. It is obliged by law to continue to provide whatever range of goods or services Parliament has determined should be provided to the consumer, i.e., the public. It must continue to provide those services no matter what the decision of a third party may be. That third party can share only in a detached way the concerns of the parties in private sector bargaining. He has no personal responsibility for the provision of the services, the viability of the employer's operations or the continuation of the enterprise. A responsible arbitrator will of course take these elements into account, but obviously in a more remote (and sometimes in a less informed way) than the employer itself. In addition, the arbitrator in a public sector dispute may feel, as he would not in a comparable private sector situation, that the resources of the employer are, if not limitless, at least extremely flexible, that the public employer has moral obligations which should be given much greater weight than would apply in relation to a private employer, that this particular employer should lead, rather than follow, in the accommodation of employees' demands for greater participation in the management of the enterprise. Not all arbitrators will make such judgments, but some may. When they do, they have the capacity to make the decision as

they see fit without being burdened, as the parties are in private sector bargaining, with the consequences of the decision. In subjecting the employer to arbitration at the sole option of the bargaining agent, as is the case under the present legislation, a philosophic imbalance is created in that the employer is denied access to a persuasive weapon that the private employer does possess.

218. It may be well to digress here to point out that there are other imbalances as well in the collective bargaining process as it concerns the interest of the employer. Every arbitral award, and indeed every collective agreement, favourable to the employees has a ripple effect. It is often difficult for an employer who is also the government to deny to employees in one bargaining unit what it has been required to give, or what it has given in bargaining, to employees in another unit. In addition, it would be possible for a bargaining agent by adroit manoeuvring - and I am not using that phrase in any pejorative sense - to obtain certain benefits for one bargaining unit through arbitration and then use that as a base upon which to build in subsequent negotiations in another unit for which it has specified the conciliation board as the dispute resolution process. While, from one point of view, arbitration is a substitute for the right to strike, it does in fact provide the bargaining agent with an additional alternative, not available to trade unions in the private sector, which enormously strengthens its bargaining position where the employees by the very nature of their work cannot bring pressure to bear upon the employer by the withdrawal of services.

219. The balance can be restored to a degree by removing some of

the temptation that a bargaining agent might have to refer to arbitration items that would otherwise be the subject of a trade-off. It might be argued that the balance could readily be corrected by making arbitration available only on agreement of both parties, i.e., to make arbitration the dispute resolution process only if both parties are prepared to resort to it. This is the solution that has been applied under the New Brunswick public service legislation,¹⁹ but it is a solution that I reject. In New Brunswick, there has only been one instance in which both parties to any dispute have agreed that it be referred to the arbitration tribunal. In addition, it gives the employer inordinate power over those whose bargaining power is weak and those whose devotion to public service makes them reluctant even to contemplate a strike.

220. Finally, in any discussion as to the sort of matters that may properly be referred to binding determination by a third party, one must bear in mind that there are some aspects of collective bargaining where there are in fact no "rights" that can be effectively enforced through the grievance procedure, where the obligation that is assumed by one party and is spelled out in a formal document, if it is to advance the interest of the other, must rest firmly on a foundation of goodwill alone. Matters of this sort can be dealt with only by consent of the parties; any attempt to have them made obligatory by the decree of a third party would rob them of all their value. To make such matters arbitrable would make a mockery of the arbitral process.

221. The considerations set out above lead me to the conclusion that limitations must be imposed on the scope of matters that should

be referable to arbitration. This conclusion leaves open the question, where is the line to be drawn between what may be arbitrated and what can only be bargained. Any limitation imposed must take account not only of the foregoing considerations but also of the countervailing likelihood that, if there is a wide discrepancy between items bargainable and items arbitrable, the employees in some bargaining units that have so far been content to live under the arbitration option might in the future be impelled to specify the conciliation board option, i.e., they may choose the strike route, a result that one cannot view with equanimity. In short, if resort to arbitration is to be regarded, as I do, as a preferable course for dispute settlement, a balance must be maintained between what may be achieved through resort to either of the processes.

222. The jurisdiction of the Public Service Arbitration Tribunal under section 70 of the Act is limited in two ways: (a) by declaring that certain matters are not to be dealt with in an arbitral award, and (b) by listing the matters that may be dealt with in an award. The first group comprises (i) by virtue of subsection 70(2), the statutes comprehended within subsection 56(2) of the Act and, in addition, (ii) by virtue of subsection 70(3), "the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees." The second group referred to above, by inference, precludes the Arbitration Tribunal from dealing with anything other than "rates of pay, hours of work, leave entitlements, standards of discipline, and other terms and conditions of employment directly related thereto."

223. It makes sense to exclude from the scope of arbitration any item that is not subject to collective bargaining and I make no recommendation that there be an alteration in subsection 70(2). However, some aspects of the matters now enumerated in subsection 70(3) would become bargainable if the recommendations set out in Chapter 3 of this report are accepted. The wording of subsection 70(3) is for all practical purposes identical with the wording of subsection 86(3). The recommendation made in paragraph 197 as to the revision of the last mentioned subsection is equally applicable to subsection 70(3). That leaves for consideration the question as to whether subsection 70(1) has the effect of excluding from arbitration matters which ought to be capable of being dealt with in an award.

224. From an examination of the arbitral awards that have been issued since the legislation came into force, it would appear that the term "rates of pay," when read along with the phrase "other terms and conditions of employment directly related thereto," has been construed as comprehending most forms of remuneration for services rendered and ancillary benefits for costs incurred by an employee in the course of, or as the result of, his employment. However, bargaining agents and their members are under the impression that some items that can be so characterized are not arbitrable; such an impression creates doubts as to whether arbitration offers a fair and just alternative as a dispute resolution process. Again, as in several other instances, it is immaterial whether these doubts are or are not warranted. That they exist is a fact of life that must be taken into account. To alleviate the fear of employees that they may not be able to have a neutral

authority rule on what is commonly referred to as the compensation package, it is recommended that the applicable words in subsection 70(1) be amended to read "compensation, including standards and rates of pay."²⁰ The procedures relating to the administration of compensation are part and parcel of the compensation package and they should also be made subject to arbitration. The terms "hours of work, leave entitlements" and "standards of discipline" do not call for any alteration.

225. One must now turn to deal with the concluding words of subsection 70(1) - "other terms and conditions of employment directly related thereto." Equity in the matter of compensation is of such vital importance to employees, both economically and from the point of view of their morale, that no limitations such as might be implied from the use of the word "directly" should be imposed that would suggest that equity is being denied to employees because they chose the arbitration route. As to the remaining items listed in subsection 70(1), nothing has come to light in my examination of the representations made to me or the arbitral awards that calls for the elimination of the word "directly" from the phrase under discussion in so far as these items are concerned.

226. To make clear the intent of the foregoing recommendations concerning the content of subsection 70(1), it is suggested that the subsection might read as follows:

Subject to this section, an arbitral award may deal with

- (a) compensation, including standards and rates of pay, and procedures relating to the administration thereof; and
- (b) hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto.

227. Grievance Procedure: Some bargaining agents proposed that grievance procedures should be made arbitrable. In view of certain recommendations in Chapter 6 concerning grievance procedure, there does not appear to be any necessity for accepting this proposal.

228. Environment: One of the topics to which several of the bargaining agents drew attention in the course of their representations was that, by reason of subsection 70(1) of the Public Service Staff Relations Act, terms and conditions of employment relating to environmental factors affecting the health, safety and physical well-being of employees was not referable to arbitration. They are clearly bargainable and some collective agreements applicable to public servants do contain a number of relevant provisions. Bargaining agents who specified arbitration as the dispute resolution process contend that this is an area in which the scales are tipped against them. An examination of collective agreements in the federal Public Service does not reveal that employees in bargaining units where the reliance is on arbitration have fared less well in this area than have employees in bargaining units that are entitled to strike in support of their demands. Nevertheless, environment is a matter of growing concern to all citizens and there can be no doubt that the denial of an opportunity to resolve differences in this area, in so far as conditions of employment are concerned, can easily become a focus of infection that might destroy harmonious employer-employee relations.

229. In weighing the advisability of making terms and conditions relating to environmental factors subject to arbitration, a number of considerations come to mind. A great many, but not all, of the problems

that arise in connection with environment transcend the interest and legitimate concerns of employees in any one bargaining unit. It is often extremely difficult for the employer to reconcile the needs and wishes in this regard of employees widely dispersed throughout the country and located in a multitude of establishments, or to time negotiations so as to take account of the divergent claims of different groups of employees. The employee organizations themselves would also experience similar difficulties. Even if all these difficulties could be overcome, one must consider the capability of a tribunal to deal with such matters. The time it would take to digest and master the voluminous and complex engineering and other data that would be placed before it in references involving these matters would protract the length of the proceedings and delay the rendering of an award on other items in dispute. Nor does it appear just and proper for the tribunal to issue a ruling on environmental conditions for employees in one unit without being in a position to assess the impact of its determination on the welfare of other employees, not parties to that proceeding, who might be directly and immediately affected by the award. One must therefore conclude that it is not feasible to recommend that terms and conditions of employment relating to environmental matters should be brought within the jurisdiction of an arbitrator.

230. The very considerations that led me to the foregoing conclusion as to the feasibility of making environmental factors arbitrable suggest that, in so far as terms and conditions of employment concerning many of these factors are concerned, the likelihood of their being dealt with in a satisfactory manner on a unit-by-unit basis in

bargaining is slight. For example, one can scarcely imagine bargaining by the bargaining agents for half a dozen different units on open landscaped offices in a single building. This whole area, therefore, provides further evidence of the need for the parties to explore the possibility of engaging in coalition bargaining.²¹

231. Training: I do not recommend that the availability of training programs or the terms and conditions under which employees may have access to or participate in such programs be made arbitrable. In order to make an intelligent award regarding training, an arbitrator would have to have a clear picture as to how such an award would fit in with the overall scheme of occupational up-grading and career development in the Public Service, a scheme that encompasses a great variety of both departmental and service-wide programs. Any decision of an arbitrator could be very tangential in nature. Such an award would be unrelated to the basic approach to, and philosophy of, training. Moreover, in relation to any particular proposal for training, while there must be some balance between the needs of the organization and the needs of individuals, I do not believe that determination of who should have access to training in an organization can be separated from operational standards and organizational goals. Organizational goals and the standards of service which should be provided to the public are not, in my view, proper subjects for decision by an arbitrator.

232. Performance evaluation: While I have concluded, generally, that performance appraisal should not be a subject referable to arbitration, the inclusion of the word "standards" in the revised text of subsection 70(1) would permit the arbitrator to deal with a

reference where an employee's pay entitlement was to be linked to production (e.g., piecework) or to the quality of his performance. In these circumstances it would not be possible to issue a meaningful award in relation to pay which did not deal with the "performance standard" which is to govern pay. However, with respect to other dimensions of performance appraisal, for example the procedures which are to govern the appraisal process and the criteria which are or are not to be utilized in the appraisal, I conclude that these are not areas in which a third party should have the capacity to impose his values. The development and application of uniform appraisal programs in the federal Public Service, as in private sector corporations, has been a difficult process. This is not surprising when we realize the extreme sensitivity that attaches to a situation where individuals, who work together day after day (usually amicably and without undue stress), are suddenly thrown into a harsh and traumatic "master-servant" relationship with their associates. Commendable efforts have been made over the years by the Public Service Commission, the Treasury Board and the personnel branches of departments to improve procedures and practice in this area. Although I do not underrate the importance to employees of good and responsible performance appraisal, for the most part it can only be achieved in the broader context of improved management capability and more effective human relations in the work-place, preferably through consultation. The development of the proper atmosphere may be promoted by consensus arrived at through bargaining; it cannot be imposed from outside. While an exception can be made in relation to performance pay, the determination of the criteria that are to be

regarded as having importance in relation to appraisal cannot, in my judgment, be separated from the determination by the employer of the duties and responsibilities of the employee.

233. Selection of assignments:²² From an examination of the recommendations made in paragraph 88 concerning bargaining on selection of assignments, it will be apparent that those recommendations contemplate a series of trade-offs, both within the ranks of the employees in the bargaining unit and between the employer and the bargaining agent, of such a nature that they do not lend themselves to arbitration. I therefore recommend that the selection of assignments should not be made arbitrable. However, it should be pointed out that, in some instances, avenues have been found that enable some groupings of employees to select their assignments without specific legal authority being conferred to do so. The acceptance of the recommendation on bargainability of assignment selection made earlier would, no doubt, pave the way for further developments in this area.

Nature of Obligation to Bargain and to Consult

234. It is recommended that the nature of the obligation to bargain, where the statute requires the parties to bargain collectively, or to consult, where the statute requires the parties to enter into consultation, should be spelled out clearly, and non-compliance with the obligation should be capable of being made the subject of a complaint to the Board. In the case of bargaining, the obligation should be to meet and bargain in good faith and make every reasonable effort to conclude a collective agreement. In the case of consultation, the obligation should be to meet and consult in good faith and make every effort

to resolve differences and problems.

Final Offer Selection

235. The Professional Institute of the Public Service of Canada pressed me to recommend that there be included in the legislation a dispute resolution process popularly known as final offer selection. The characteristics of this process are that each of the parties presents to a third party - known as a selector - a proposal as to how the dispute is to be resolved. The selector must select one or other of the two proposals; he is not permitted to make an award according to what he concludes to be right or proper in the particular circumstances. The premise on which this process rests is that each of the parties will be induced to present a reasonable proposal because of the fact that the selector will reject out of hand an unreasonable proposal.

236. In theory, this approach to dispute resolution would moderate the demands of bargaining agents, induce more reasonable responses to the demands by the employer, and generally rationalize the bargaining process. Indeed, I have heard the view expressed that it is such a drastic process that, as in the case of atomic weaponry, its very existence will guarantee that the parties will settle their differences without resort to it. I am by no means convinced that it will work in practice. It assumes that collective bargaining is, or can be induced to become, a highly rational process; experience does not support this assumption. There is an obvious and grave danger that the selector may be compelled to choose between two unreasonable and unrealistic proposals; this state of affairs is especially likely to occur when neither of the parties involved has had any previous experience with

the process or, as so often happens, where the parties are morally convinced of the justice of their respective positions.

237. Although my own experience and the assessment I have been able to make of the process leave me with serious doubts as to the soundness of final offer selection as a solution for resolving interest disputes, I am aware that some jurisdictions are experimenting with it in its various forms, for example, the states of Wisconsin, Michigan and Massachusetts in the United States. It is too early to judge whether any of those experiments have met with any ascertainable measure of success. However, as I stated in Chapter 1 of this report, "One must be on the look-out for new procedures, new techniques and new remedies." I am not inclined to close the door on any experiment. Consequently, I recommend that the legislation should permit the parties by mutual consent, notwithstanding any other provision of the legislation, to resort to final offer selection in whatever form they deem best suited to their needs in any particular case. The consent should be in writing, should set out in detail the procedures to be followed and should be filed with the Board. The parties should be bound by the procedures thus established and the decision of the selector should have the same binding force as an arbitral award.

238. Some of the officers of the Professional Institute urged me to recommend that final offer selection be added to the legislation as a third dispute resolution process which would be binding on the employer at the option of the bargaining agent for a particular bargaining unit. I make no such recommendations. Indeed, to do what these officers suggest seems to me to be completely contrary to the philosophy of human relations they espouse.

FOOTNOTES

1. This report proceeds on the premise that public servants are entitled to participate in the determination of their terms and conditions of employment through collective bargaining, a premise that is generally accepted in Canada although still resisted in some sections in the United States.
2. Canadian Industrial Relations, The Report of the Task Force on Labour Relations, The Queen's Printer, Ottawa, 1969 (popularly known as the Woods Report), p. 120.
3. Leslie Williams, "Political and Economic Background to Three Major Industrial Disputes in the Public Service of the United Kingdom" in Proceedings of the International Symposium on Public Employment Labour Relations, New York, May 3-5, 1971, p. 96 at p. 101.
4. It may not be amiss to point out that, what seems to have become the conventional wisdom in some quarters - that arbitration of interest disputes rings the death knell of collective bargaining - cannot be said to be an accurate reflection of the experience under the Public Service Staff Relations Act since that Act came into force. See my address to the Symposium on Revision of California's Public Employee Bargaining Laws, San Francisco, California, May 24, 1973, p. 55 at p. 64.
5. Paragraphs 213 ff.
6. S.C. 1972, c. 18.
7. Ibid.
8. The determination of the Board in this context could be either a final determination on the definitive proposal submitted by the employer or an interim determination that more than 50% of the employees in the unit would be designated.
9. For example, the season of the year when a strike occurs may have a significant effect on the proposals.
10. Electronics Designated Employees Case No. 1, (1969) PSSR Reports K 394, at K 413 ff.
11. S.C. 1972, c. 18, section 166.
12. Ibid, section 181.
13. Paragraphs 182 ff.
14. R.S.O. 1970, c. 232.

15. The appropriate provision should be so phrased as to apply to a component, branch, unit or similar section of an employee organization.
16. Postal Operations Lockout Case, (1970) PSSR Reports K 565.
17. Supra, footnote 2, p. 117.
18. Ibid, p. 96.
19. New Brunswick Public Service Labour Relations Act, S.N.B. 1968, c. 88.
20. Although, traditionally, the position occupied by an employee in the Public Service has been the prime determinate of his pay, pay plans may also take account of other factors such as length of service, educational attainment, personal rank, cost of living, the period of the day in which work is discharged, the quantity or quality of the work performed, and such environmental factors as isolation or danger. The recommendation for the inclusion of the word "standards" in subsection 70(1) of the Act is intended to make it clear that the arbitration tribunal is authorized to establish or vary criteria which affect the entitlement of an employee to a particular rate of pay.
21. Cf. paragraph 329.
22. This term includes postings, transfers, and so on, where no change in classification is involved.

Chapter 5

RESOLUTION OF RIGHTS DISPUTES

Right to Refer Grievance to Adjudication

239. Under subsection 90(1) of the Public Service Staff Relations Act, an employee is entitled, subject to certain limitations, to present a grievance if he feels himself aggrieved by any matter or occurrence affecting his terms and conditions of employment and to pursue the grievance up to and including the final level in the grievance procedure. One limitation concerns grievances in respect of which an administrative procedure for redress is provided in or under an Act of Parliament, i.e., an Act other than the Public Service Staff Relations Act. Again, an employee is not entitled to present a grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award unless he has the approval of, and is represented by, his bargaining agent. A further limitation bars grievances relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 112 of the Act, the section dealing with the safety or security of Canada or any state allied or associated with Canada.¹

240. Not all grievances that may be presented by an employee are subject to third-party determination. That form of relief is available to an employee only if the grievance is one with respect

to:

- (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
- (b) disciplinary action resulting in discharge, suspension or a financial penalty.

Third-party determination is also available under section 98 of the Act to a bargaining agent as well as to the employer with respect to an obligation in a collective agreement or arbitral award, the enforcement of which is not one that may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies. A whole series of problems has arisen in connection with the provisions of the Act concerning grievances. Although some of them are interrelated, others stand on their own feet. It therefore becomes necessary to deal with each of them in some sort of sequence.

241. Grievances for which administrative procedure for redress available: It has been suggested that the first limitation referred to in paragraph 239, which on the face of it bars an employee from presenting a grievance in circumstances where an administrative procedure for redress is provided in or under an Act of Parliament, should be deleted. It is said that an employee cannot be taken to know what administrative procedure for redress is so provided and that, if he does happen to resort to such an administrative procedure in error, he may forfeit his right to present a grievance under the Public Service Staff Relations Act. So far as I have been able to ascertain, there have been very few instances in which the

employer or its agents have refused to accept a grievance on the ground that resort should have been had to a process other than the one provided for under the Public Service Staff Relations Act. In the rare instances where this has occurred and the matter has been brought to the attention of the Board, either by way of complaint or even informally, an officer of the Board has succeeded in having the grievance accepted without difficulty. A grievance relating to a matter that did not fall strictly within the provisions of subsection 90(1), once presented, has usually been processed through the various levels of the grievance procedure, the reply of the employer being that redress lay elsewhere - and this has been so even though in strict law the employer might have been entitled to refuse to treat it as a grievance and to make any reply thereto.

242. Merely to remove the limitation might make the employer subject to a complaint being filed with the Board under section 20 of the Public Service Staff Relations Act alleging that it had failed to comply with a regulation respecting grievances made by the Board or provided under a collective agreement. It would be ridiculous to force the employer to go through the motions of replying to a grievance at the various levels of the grievance procedure where the matter properly lies within the jurisdiction of some authority other than one that is established under the Public Service Staff Relations Act. It would be the course of wisdom to avoid a useless step in a situation of this sort. It is accordingly recommended that (a) the words "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament" be deleted from

subsection 90(1) of the Act, and (b) where the reply of the employer at any level is that there is an administrative procedure for redress available, the grievance should be referred immediately to the final level of the grievance process, i.e., bypassing the intermediate steps. If the reply at the final level is to the same effect, the reply should also state what that procedure may be. If the aggrieved employee challenges the validity of the reply, he should be entitled to refer the matter to the Board for a ruling on the technical point at issue. In effect, this is what occurs under the legislation as it stands. If the employee resorts to the process indicated at the final level, or if he resorts to another process on his own initiative, and there is a determination of his "complaint" on the merits, he should be foreclosed from presenting his grievance further under the Public Service Staff Relations Act. However, if the employee is misinformed as to the proper process for redress and if he does resort to the process indicated in the reply of the employer's agent, he should be protected against loss of the right to refer a grievance to adjudication by reason of any delay resulting from the misinformation.

243. Grievances arising out of collective agreements or arbitral awards: Despite the fact that, where the interpretation or application of a collective agreement is involved in a grievance the employee must have the blessing of the bargaining agent before he can proceed, the bargaining agents were particularly vehement in denouncing the principle embodied in the present legislation that vests the "ownership" of a grievance in the aggrieved employee. The main argument advanced by them was that many employees are extremely reluctant

to present a grievance which may generate resentment in their superiors. Some members of management might regard the presentation of a grievance as a reflection on their personal capacity;² employees who are dependent on the goodwill of their superiors for advancement feel they may jeopardize their future if they seek relief as they are entitled to do under the Act. In isolated posts, the pique of a superior may make life exceedingly unpleasant.

244. It was pointed out to the representatives of the bargaining agents that, even if the bargaining agents were entitled to file grievances on behalf of employees, the employees would have to be clearly identified and would usually have to appear at a hearing and testify regarding the occurrences that gave rise to the grievance if a decision of a remedial nature in their favour was to be rendered. In these circumstances, the employee would in most instances be laying himself open to the same recriminations he might fear if he himself filed the grievance in the first place. The response of the bargaining agents was that employees believe they would have less to fear if the bargaining agent were the initiator of the grievance.

245. We are faced here with a dilemma. In a service where advancement is a goal of many employees - far more so than in the vast majority of bargaining units in the private sector - an employee may feel that his expectations of promotion will be lessened whether he files a grievance himself or it is filed by the bargaining agent. There is ground for saying that an employee should not be required by law to expose himself to what he may believe to be a risk that he does not wish to incur. If the grievance were referred to

adjudication, the employee could be required to testify under oath in view of recommendations made in Chapter 7. He might then be faced with a choice of exposing himself to the recriminations he feared in the first place or perhaps giving false testimony, i.e., committing perjury. He would have Hobson's choice. On the other hand, there is substance in the contentions of the bargaining agents that they should be entitled to present grievances arising out of the interpretation or application of a collective agreement. It is a legitimate objective of a bargaining agent to seek an interpretation of a clause in a collective agreement that is favourable to employees in the bargaining unit. In addition, the contention of the bargaining agents receives support from the pattern of legislation applicable to the private sector, which permits the parties to enter into collective agreements wherein the grievance is "owned" by the bargaining agent. The Ontario Labour Relations Act goes even further and states that every collective agreement

shall provide for the final and binding settlement by arbitration ... of all differences between the parties ... [i.e., between the employer and the bargaining agent] arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

246. It is therefore recommended that the Act be amended to permit a bargaining agent and the employer to include in a collective agreement a provision that the bargaining agent should be entitled to present on behalf of employees a grievance relating to the interpretation or application in respect of identified employees of a provision of a collective agreement or an arbitral award. The

bargaining agent should be required to notify in writing any employee to be identified in such a grievance of its intent to file the grievance and, if the employee advises the bargaining agent in writing that he does not wish to be associated with the grievance, the bargaining agent should not be entitled to process the grievance in so far as it relates to such employee. It might be said that this recommendation would still leave the door open to possible intimidation of an employee by a member of management to cause him to withdraw his association with the grievance. Such situations can be dealt with by way of complaint by the bargaining agent to the Board under the prohibited practices provisions of the Act. The possibility of an official of a bargaining agent intimidating an employee to become identified with a grievance could be dealt with in similar fashion. The foregoing recommendation deals only with grievances relating to the interpretation or application of a collective agreement or arbitral award; it is not intended that it should apply to other grievances dealt with in various sections of this chapter which might be filed by an employee even though the consent of a bargaining agent is called for in those circumstances.

247. The definition of the term "grievance" in the definition section of the Act declares that

for the purposes of the provisions of the Act respecting grievances with respect to disciplinary action resulting in discharge or suspension, a reference to an "employee" includes a former employee ...

No such privilege is accorded in express terms to a discharged person with respect to rights which he alleges may have accrued to him

under a collective agreement or arbitral award before his discharge, or to a person who has resigned, retired, or been laid off, or to the heirs of a person who dies before his "rights" have been determined. Adjudicators have held in a number of instances that the grievances of such persons could be dealt with under section 98 of the Act which reads as follows:

(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and

- (a) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and
- (b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies,

either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the chief adjudicator who shall personally hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.

(2) The Chief adjudicator shall hear and determine the matter so referred to him as though it were a grievance, ...

Some of these decisions have been challenged by references to the Board under section 23 of the Act³ and it has been suggested that, if the Board's decisions are unfavourable to the employer, there may be further references to the Federal Court. Whatever the legal position under the Act as it stands may be, it appears to be desirable that rights that accrue to employees during their terms of employment should not be denied them because of their loss of status as employees. It is therefore recommended that appropriate

amendments be incorporated in any revision of the legislation to ensure the protection of such rights and the availability of adequate remedies under the Act. It would also appear to be advisable to remove any doubts that may exist as to the authority of an adjudicator to provide a remedy, appropriate to the circumstances, where a bargaining agent seeks to enforce an obligation under a collective agreement "owing" to the bargaining agent, or the employer is seeking to enforce an obligation "owing" to the employer. It is recommended that section 98 should be amended accordingly.

248. Some of the bargaining agents sought the right to refer what they described as policy grievances to adjudication. As I understand their proposal, it is that they be permitted to seek and obtain a decision as to the meaning of a provision of a collective agreement or arbitral award or a ruling as to whether a specified action or omission of the employer constitutes an infringement of a collective agreement or arbitral award. Advisory opinions are not the stuff of which sound jurisprudence is made. Nevertheless, there are probably some situations, where a dispute arises as to the interpretation of a provision of a collective agreement or arbitral award, that can be dealt with most conveniently by a declaratory decision. It appears desirable to provide an opportunity for such matters to be referred to third-party determination, but in a manner that will not open the door to requests being submitted that are for purely advisory opinions. It is therefore recommended that references to adjudication be permitted by either party of questions relating to the interpretation or application of a collective agreement or

arbitral award, even though the applying party is not seeking to enforce an obligation owing to it alleged to arise out of the collective agreement or arbitral award, but that discretion be vested in the Board to refuse to make a determination with respect thereto. In any event, the determination of the adjudicator on such an application should be purely of a declaratory nature.

249. Grievances arising out of statutes and regulations: Among the matters on which an employee may present a grievance under subparagraph 90(1)(a)(i) of the Act is the interpretation or application in respect of him of a statute, or a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, subject of course to the proviso that was dealt with in paragraphs 241 and 242 of this report of matters in respect of which an administrative procedure for redress is provided in or under an Act of Parliament. The principle embodied in this subparagraph of the Act represents an enlightened approach to employer-employee relations. It provides a safety valve that enables a disaffected employee to have his complaint looked into by someone in authority and it also flashes a warning light to the upper echelons of management that something may be amiss that should be corrected before it becomes a cancerous growth. The bargaining agents propose that all matters with respect to which a grievance may be presented should also be subject to binding third-party determination.

250. Before such a proposal can be given serious consideration, it would be necessary to assemble and examine in detail all statutes,

regulations, by-laws, directions and instruments that might come within the subparagraph. Without such a thorough examination, it would be foolhardy to vest in a third party operating under the Public Service Staff Relations Act such an unlimited jurisdiction. The time frame for the preparation of this report precludes such a study being made.

251. In addition, the proposal has no counterpart in legislation applicable to the private sector. In that sector, the right to bring a grievance to arbitration flows from the provisions of a collective agreement. The proposal of the bargaining agents would make grievances referable to third-party determination even in respect of matters on which they may have sought to bargain but failed to have covered by a collective agreement. I do not think it would be proper to confer upon public servants at this time an extraordinary privilege of this sort.

252. The main argument presented by the bargaining agents in support of this proposal is that many matters coming within subparagraph 90(1)(a)(i) of the Act and that are not now adjudicable are removed from bargaining by various provisions of the Public Service Staff Relations Act. The cogency of this argument is reduced to a degree by the recommendations set forth in Chapter 3 of this report on the expansion of the scope of bargaining and by some of the recommendations in this report for the expansion of the range of matters on which an employee's grievance can be presented to third-party determination. As for the remainder, even if it were deemed desirable to draw a line between matters bargainable

and grievable under revised legislation, on the one hand, and other matters that would be bargainable say in the private sector but are in the "forbidden" zone for public servants, any attempt to draw such a line would lead to endless litigation that is likely to poison the relationship between the parties. Nothing that is said in this section of the report is to be taken as casting any doubt on the authority of an adjudicator to construe a provision of a statute or a regulation, by-law, direction or other instrument made or issued by the employer dealing with terms or conditions of employment, where an adjudicator finds it necessary to do so in order to construe or apply the terms of a collective agreement or arbitral award.

253. Grievances arising out of non-implementation of "National Joint Council directives": A related proposal of the bargaining agents was that grievances arising out of alleged non-implementation of directives issued by the employer and by deputy heads following understandings reached at the National Joint Council be subject to third-party determination under the Public Service Staff Relations Act. Before embarking on an examination of this proposal, it may be well to consider the functions of the National Joint Council as spelled out in the constitution of that institution as amended on May 30, 1967, following the coming into force of the Public Service Staff Relations Act. Section 5 of this constitution reads in part as follows:

DUTIES OF THE COUNCIL

- (a) To consider any and all matters which by decision of the Council are considered to serve the purpose for which the National

Joint Council is established excluding matters involving rates of pay, standard hours of work, leave entitlements and related conditions of employment that are the subject matter of arbitration procedures, and any other matter that is the subject matter of collective bargaining procedures except as provided in paragraph (b).

- (b) The Council may consider matters which are subject to collective bargaining procedures which, by agreement between the parties engaged in bargaining, are referred to the Council either to develop administrative details or by agreement between the parties engaged in the bargaining, are removed as a subject matter of collective bargaining and referred to the Council for consideration.

The proposal of the bargaining agents must be looked at in its possible impact on (a) directives flowing from National Joint Council deliberations now in force and (b) directives that may come into force in the future.

254. (a) The directives now in force were not framed as instruments that the parties contemplated as being subject to third-party determination. They are not couched in "legislative" language, but are often expressed in what might be described as narrative form. When any question arose in the past as to their meaning or application, the parties in seeking to resolve their differences or to ascertain the true intent of a directive were free to resort to sources and aids to interpretation that are not admissible before a tribunal entrusted by law with construing a written document. Some of the directives contain an element of discretion necessary to proper administration that defies precise wording - the compendium

known as the Foreign Service Directives is an example. To provide by the stroke of a pen that grievances may be presented alleging a misinterpretation or misapplication of the great number of directives now in operation would create a chaotic and unhealthy situation. For an indication as to what might ensue, one has only to recall the problems that arose out of the incorporation in a number of the early collective agreements in the Public Service of clauses that were identical with some that had previously formed part of various directives issued unilaterally by the employer. Little thought seems to have been given to what the words would mean to a third party not privy to the consultations that led to their adoption initially. Departmental officials often proceeded to construe such clauses according to their own lights, as they had in the past, only to discover to their chagrin that the words had a meaning they had not anticipated. Representatives of bargaining agents at times found themselves in a similar plight. Much as some may bemoan the tendency of arbitrators to apply literal and legal concepts in their interpretation of collective agreements, the fact remains that collective agreements are legal documents and arbitrators must have regard for the fact that their decisions may ultimately have to pass the scrutiny of courts composed of lawyers. If third-party binding determination is to be made available with regard to past directives that had their origin in National Joint Council deliberations, it could only be if and when such directives were rewritten with the possibility of such determination in view. This conclusion brings us to a consideration of the adjudicability of future directives.

255. (b) The National Joint Council has an impressive record of accomplishments in dealing with service-wide issues, but it remains legally a recommending rather than a determining body. Its procedures reflect a consultative rather than a bargaining relationship and it is possible for the parties in their deliberations to adopt a stance that differs markedly from that which prevails when they sit across from each other at the bargaining table. There is nothing to prevent the staff side of the National Joint Council and the employer side engaging in bargaining on bargainable matters and incorporating any terms and conditions agreed upon into the respective collective agreements. Whether it would be wise for the Council to modify its traditional modus operandi and engage in true bargaining is something to which the parties may well have to address themselves in the future. Such a course may be fraught with peril for the preservation of the National Joint Council. Members of that Council alone can judge whether they would gain collectively more than they would lose by converting the National Joint Council into an institution where the employer would be confronted at the bargaining table by 13 bargaining agents. If they should deem it advisable to do so, their deliberations might result in amendments to the respective collective agreements enforceable through the grievance procedure as it presently exists.⁴ If they reach the conclusion that the National Joint Council as it has operated for the last few years has advantages that would be sacrificed by converting it into a bargaining forum, they must be left to their own devices to evolve a mechanism for dealing with allegations of non-compliance with

directives that emanate in due course from the activities of the Council. I am therefore driven to the conclusion that I ought not to recommend that final and binding third-party determination be made available by statute for grievances that may arise out of the interpretation or application of such directives.

256. Should the parties at any time jointly wish to have recourse to the Board to adjudicate on a dispute as to the implementation of any directive or instrument of the nature under discussion in this portion of the report, they could, of course, do so without any legislative endorsement. There have been instances in the past where the employer and a bargaining agent have referred to the Chief Adjudicator as persona designata matters not subject to adjudication in the usual fashion. I am not aware of any case in which the Chief Adjudicator refused to act. I have no hesitation in saying the same sort of response would be forthcoming in the future if occasion arose. Since doubts might arise as to whether a decision in these circumstances would be enforceable, it would be advisable to make express provision therefor.

257. Release or demotion for incompetence or incapacity:⁵

Under the provisions of section 31 of the Public Service Employment Act, a deputy head may recommend to the Public Service Commission the release of a public servant for incompetence or incapacity and, when he does so, he is required to give notice in writing of his recommendation to the person concerned. A public servant who receives such a notice may appeal to the Public Service Commission; the Commission, after considering the report of a board of inquiry, may

notify the deputy head that his recommendation will not be acted upon or it may release the employee or appoint him to a position at a lower maximum rate of pay. Under the provisions of sections 90 and 91 of the Public Service Staff Relations Act a public servant, who has been discharged, or suspended, or where a financial penalty has been imposed on him as a form of disciplinary action, may present a grievance in respect of the discharge, the suspension or the financial penalty and may process it to final determination by an adjudicator under that Act.

258. The provision of two separate avenues of redress for a public servant who has been removed from his post or penalized by the employer appears to be based on the assumption that the Commission's authority to establish the qualifications required for appointment to any position or class of positions in the Public Service, and to qualify individuals for appointment, is an aspect of the merit principle which would be undermined if the Commission did not retain control over the release of employees on grounds of incompetence or incapacity. This assumption calls for careful examination.

259. The objective (quantifiable) dimensions of an individual's qualifications, such as education, years of experience and professional, linguistic or trades qualifications are capable of being determined at the time of appointment. The evaluation of subjective dimensions of qualification (e.g., personal suitability) is largely in the nature of a prediction rather than a finding of fact. Whether a candidate does or does not possess the requisite qualifications of this character cannot be established by reference to his past

performance; past performance is not a guarantee of satisfactory future performance, especially where there is a substantial change in duties, in responsibilities, or in environment. Subjective dimensions can only be adequately tested in the work situation. A person may be "qualified" in a formal sense - by way of education, experience, technical or professional credentials and so on - but may nevertheless be unable to meet all the requirements of the job. Judgments made by staffing officers must necessarily give way to on-the-job performance evaluation where performance falls below that which was anticipated on the basis of the formal qualifications.

260. The testing in the work situation is in large measure in the hands, not of the Commission, but of the deputy head. Section 28 of the Public Service Employment Act reflects the need of an employer to assess the capabilities of an employee on the job and vests in the deputy head authority to reject an employee during his probationary period - the period is determined by the Commission - subject only to the requirement that the deputy head must inform the Commission of the reasons for rejection. In effect, during the probationary period operating management may, without restraint, disqualify an employee who has been qualified by the Commission if, in the operational context, his performance falls below the standard established under authority of the deputy head. Once the probationary period is over, the Public Service Employment Act protects an employee against being removed from his position without proof, before a third party - an appeal board - of his incompetence or his incapacity.

261. In practice it is often difficult to draw the line between what constitutes incompetence or incapacity, on the one hand, and the circumstances that warrant disciplinary action on the other. Is addiction to alcohol or drugs, persistent lateness or absence, discourtesy or display of an abrasive attitude towards the public or fellow employees, immoral or criminal conduct on or off the job, or negligence in the performance of duties to be looked upon as incompetence or incapacity or is it something meriting discipline? An examination of the quarterly issues of Selected Appeal Board Decisions⁶ published by the Public Service Commission and of the decisions of adjudicators⁷ discloses that there is a gray area here.

262. Where involuntary termination of employment is contemplated, supervisors, staff relations officers and ultimately the deputy head himself must decide whether to proceed under section 31 of the Public Service Employment Act or to take disciplinary action. The choice is particularly difficult where, as often happens, there are various grounds for dissatisfaction with the employee and perhaps none, standing by itself, warrants removal. Once the choice is made, the employer is committed and runs the risk of being overruled by the appeal board, on the ground that the case is not really one of incompetence or incapacity, or of being overruled by an adjudicator, on the ground that the case is not really disciplinary. If release under section 31 of the Public Service Employment Act is recommended, the employee and perhaps his bargaining agent must decide whether to appeal the recommendation or to challenge the action taken as being in reality disciplinary. Until all the evidence is in, no one

can be certain about the correct choice. Appeal boards and adjudicators must spend time listening to wrangles about jurisdiction and their decisions may ultimately be taken to the Federal Court. In the meantime - and many months may elapse - the employee may remain unemployed and the employer runs the risk of eventually having to pay out public money for which no services were rendered.⁸ No amount of litigation is likely to clarify the distinction between incompetence or incapacity, on the one hand, and misconduct or breaches of discipline, on the other, and it is scarcely likely that there can be any clear-cut statutory definitions of the two concepts.⁹ In any event, overlapping jurisdiction is inevitable where there is evidence, slight or substantial, of both incompetence and misconduct.

263. Where physical or mental qualifications are concerned, specifications are now established by the employing departments rather than the Commission and, if there is any dispute as to whether an employee's qualifications in this regard have deteriorated, evidence of an objective nature is readily available which can be as well assessed by a third party operating under the Public Service Staff Relations Act as by an appeal board operating under the Public Service Employment Act. As to other quantifiable dimensions already referred to, these do not ordinarily deteriorate over time and in fact usually increase rather than decrease over the years. Any tribunal charged with assessing the justice of a particular release or discharge is almost invariably concerned to review the performance of the employee in the work place or in some other situation which affects the quality of his performance on the job.

Evidence relating to performance must be secured from the employee's supervisor and from other persons familiar with his performance. The judgment that has to be made is not whether the individual has, or no longer has, the qualifications that the selection board concluded he had at the time of appointment. The question that calls for determination is whether, in the light of his conduct and performance, he should be continued in his position or removed therefrom.

264. The crucial issue is one of establishing a balance between the interest of the employer and that of the employee. During the probationary period, the interest of the employer is to have a reasonable opportunity to appraise the performance of the employee in the work place to ascertain whether he meets the requirements of the job; during this period, the employer has the authority to reject him without challenge of its judgment on this score. When the employee has previously met the standards of performance established for the job by the employer, i.e., after the probationary period has come to an end, the employer must submit to a review of its action by a third party. Such review does not constitute an infringement of the merit principle if it is conducted by someone other than the Commission. The foregoing considerations lead me to conclude that the present divided jurisdiction in this area of employer-employee relations must be eliminated. I recommend that, subject to certain exceptions set out below, exclusive authority to hear and determine any reference relating to the removal by the employer of an employee from the Public Service,¹⁰ whatever the reason that may be adduced by the employer to justify the removal, should be placed under the

Public Service Staff Relations Act. I am convinced that this recommendation does not invade the historic role of the Commission to administer and protect the merit principle.

265. The foregoing recommendation should not apply to action taken against an employee because of political partisanship under section 32 of the Public Service Employment Act¹¹ or because of irregularities or fraudulent practices relating to appointment under section 41 of that Act. Nor can it apply to security situations. Again, it should not affect the authority for review by the Commission of any dispute relating to the duration of appointment of a person appointed for a specified period or in respect of the non-renewal of such an appointment. It should, however, apply to involuntary demotion of an employee or to a declaration that an employee has abandoned his position under section 27 of the Public Service Employment Act.¹²

266. Persons employed in a managerial or confidential capacity are deemed to be employees for the purposes of any provisions of the Public Service Staff Relations Act "respecting grievances with respect to disciplinary action resulting in discharge or suspension." Such persons also have a right of appeal under the Public Service Employment Act against recommendations by a deputy head that they be released for incompetence or incapacity. No one has suggested to me that the traditional rights of such persons should be taken away. Since, as was discussed in paragraph 264, the divided jurisdiction in this area should be eliminated, the recommendations in this section of the report relating to release of employees should be

applicable to persons employed in a managerial or confidential capacity.

267. In dealing with grievances in which incompetence or incapacity is established, the question arises as to what is owed to an employee who, although he may not be competent to perform the job that he previously performed, is by no means disqualified for appointment to another position in the Public Service. I am of course especially concerned in this regard to maximize opportunities for reassignment of long service employees who, for reasons of age or ill-health, may no longer be able to meet the required standards of performance and who would not, prior to their removal, voluntarily accept appointment to a position with a lower level of classification. The present legislation empowers the Commission to appoint such an employee to a position at a lower maximum rate of pay. The Commission's capacity to facilitate the appropriate placement of such persons should be retained and strengthened. In these and similar circumstances, where the action of the employer would result in the separation of the employee from the Public Service, but the adjudicator concludes that the employee is not so incompetent or incapacitated that he is incapable of performing the duties of another position, the adjudicator should have the discretion to recommend to the Commission that he be given another appointment appropriate to his qualifications. The Commission should then be empowered to assign to such a person the status of a lay-off. The effect of assigning this status to such an employee would be to give him priority of appointment to any vacant position for which

he may be qualified.

268. Authority of adjudicator to determine appropriate penalty:
Section 96 of the Public Service Staff Relations Act declares that the adjudicator, after having given both parties to the grievance the opportunity to be heard and after having considered the grievance, "shall render a decision thereon" and, where a decision on a grievance referred to adjudication requires action by or on the part of the employer, an employee or the bargaining agent, such action shall be taken. In the case of grievances relating to disciplinary action, adjudicators have treated these provisions as conferring upon them the power, and indeed the duty, of determining whether disciplinary action was taken on just and adequate grounds and, if so, whether the penalty is appropriate or should be reduced.

269. In Port Arthur Shipbuilding Co. v. Arthurs et al.,¹³ the Supreme Court of Canada came to certain conclusions as to the authority, under the Ontario Labour Relations Act,¹⁴ of an arbitrator to determine in certain circumstances whether, in a disciplinary grievance, the penalty imposed by the employer was appropriate or should be reduced. Subsequently, the labour relations statutes in many jurisdictions in Canada were amended so as to broaden the jurisdiction of an arbitrator in dealing with such a question. Section 157 of the Canada Labour Code¹⁵ declares in part:

An arbitrator appointed pursuant to a collective agreement ...

(d) where

- (i) he ... determines that an employee has been discharged or disciplined by an employer for cause, and
- (ii) the collective agreement does not

contain a specific penalty for the infraction that is the subject of the arbitration,
has power to substitute for the discharge or discipline such other penalty as to the arbitrator ... seems just and reasonable in the circumstances.

270. As far as I can ascertain, the employer has not taken the position before any of the adjudicators that the principle of the Port Arthur Shipbuilding Case was applicable in the federal Public Service. However, several recent decisions¹⁶ of the courts in the Province of New Brunswick regarding provisions of the New Brunswick Public Service Labour Relations Act,¹⁷ which correspond to section 96 of the Public Service Staff Relations Act, raise a question as to the application of the Port Arthur Shipbuilding Case that should be resolved by express provision in any revised Public Service Staff Relations Act. It is therefore recommended that there be included in the legislation a provision similar to section 157 of the Canada Labour Code. In addition, to remove any lingering doubt there may be as to the authority of an adjudicator to provide an effective remedy, section 96 of the Public Service Staff Relations Act should be amended to declare that an adjudicator in rendering a decision is empowered to direct, where requisite, but subject to any provision of the Act that limits his authority in respect of certain types of grievances, such action to be taken as may be appropriate in the circumstances.

271. Classification grievances: Although the bargaining agents conceded that some of them might experience difficulty in bargaining classification standards and some also conceded that an effective

formula for consultation on such standards might meet their needs at this juncture, they were unanimously of the opinion that classification grievances should be subject to adjudication under a revised Public Service Staff Relations Act. At present, although an employee is permitted to process a classification grievance to the final level in the department or agency concerned, he cannot refer such a grievance to adjudication. In a legal sense, as is the case with regard to classification standards, it is the agents of the employer who determine unilaterally whether a classification grievance is or is not valid. There is an established administrative procedure to which an employee can resort to have the classification of his position reviewed and, under this procedure, persons other than the one who initially classified the position examine the situation and make a determination. The Treasury Board Secretariat submitted that the process for redress of classification grievances established by the Treasury Board had had a noteworthy measure of success and that there was no demonstrated need to replace it by any other process. The position of the bargaining agents is that, with the delegation of classification authority to departments, the voice of the classification review board in most cases appears to the employee concerned to be a departmental voice which cannot be dissociated in any real sense from that of the person who made the initial classification decision.

272. While the record of the Treasury Board in dealing with classification grievances is impressive, the fact remains that, in the eyes of public servants, the present procedure for redress has

a paternalistic coloration that creates doubt as to the objectivity of the determination made by the classification review board. The old saying about justice being done only if it manifestly and undoubtedly appears to be done has application to this situation. In my opinion, it is highly desirable that decisions in this area should be made by persons whose independence from the employer interest can be clearly discernible. Accordingly, I recommend that classification grievances presented by employees be made adjudicable under the provisions of a revised Public Service Staff Relations Act.

273. The existing review procedure, provided for under the Treasury Board directive of May 8, 1968, which provides the employee with an opportunity to seek clarification of the duties and responsibilities assigned to his position and to discuss with his supervisor the possibility of a revision in the classification of the position without involving the formal grievance procedure, or some similar arrangement, should continue to operate to screen out situations that lend themselves to adjustment before there is a reference to adjudication. In other words, although an employee should not be forbidden to file a classification grievance at any time, as he is entitled to do at present, he should be encouraged to resort to the more informal review procedure. If he institutes a grievance without first seeking review, he should be required to do so within the period fixed by the regulations for the filing of such a grievance. This period is now set by the P.S.S.R.B. Regulations and Rules of Procedure as being not later than the twenty-fifth day after the day on which he was notified orally or in writing, or where he

was not so notified, after the day on which he first had knowledge, of any action or circumstance giving rise to the grievance. If he presents to his supervisor a written request for the review of the classification decision, he should be required to file a grievance not later than 30 days from the date on which he is notified that the original classification decision has been confirmed or, if no such notice has been given to him, not later than twelve months from the day on which he submitted a written request for review to his supervisor.

274. Classification is by no means an exact science. It must be recognized that there is a degree of tolerance in the process which should not be regarded as reflecting error in the classification of a position. An adjudicator should not be entitled to set aside a decision of a classification officer unless he is satisfied (a) that there was an erroneous finding of fact as to duties and responsibilities expressly assigned to the employee, or that were regularly performed by him with the knowledge of the person under whose direction the duties and responsibilities were performed, of such a nature as to warrant the position being given a different classification, or (b) that there has been a significant deviation or departure from the standard as applied in the case of the aggrieved employee.

275. If, in applying the criteria set forth in the immediately preceding paragraph, the adjudicator should determine that the aggrieved employee was incorrectly classified, (a) he should be

authorized to direct that the employee be compensated at the rate applicable to the employee, having regard to the classification of the position as found by the adjudicator to be appropriate, and (b) the employer should take such action as may be necessary to regularize the situation.

276. Where the decision of the adjudicator with respect to the classification involves an upward change in the employee's pay entitlement, the adjudicator should be empowered to determine, within certain limits, the period of retroactivity applicable to any pay adjustment. The limits on retroactivity should be

- (a) for a period that does not pre-date by more than 30 days the date on which the employee requested a review of the classification decision or does not exceed twelve months from the date on which a grievance in respect thereof was presented, or
- (b) if the employee did not ask for such review, for a period that does not pre-date by more than 30 days the date on which he presented his grievance.

Where the decision of the adjudicator involves a downward change in the employee's pay entitlement, such change should not be made retroactive to a date earlier than the day on which the adjudicator's decision is communicated to the parties. Where the employer has deferred the adjudication of classification grievances with the consent of the Board as provided for in a recommendation set out in paragraph 279, the period of deferment is not to be counted in calculating the 12 month period in (b) above.

277. Where an employee's duties and responsibilities have

been increased on his own initiative, even though with the knowledge of his supervisor, and in the course of a review or the consideration of a grievance the employer formally readjusts (i.e., reduces) the duties and responsibilities to conform to those previously assigned, the adjudicator should be bound, on any reference to adjudication, to make his decision as to the proper classification of the position on the basis of the duties as readjusted by the employer, but he may direct that the employee be compensated for the period prior to the readjustment at the rate applicable to the classification which the adjudicator determines was proper for that period.

278. I feel it necessary to focus attention on a particular aspect of the problem in order to avoid any unwarranted expectations that might be engendered by the institution of a third-party review of classifications. "Classification creep," brought about by employee rather than employer initiative, is a familiar and in many circumstances legitimate part of the administrative process. In some occupational areas in the Public Service, employees are expected to respond dynamically to the demands and challenges of their work. Where the employer accepts an expansion of work activity, and approves it, such activity should be reflected in the job description and taken into account in the classification of the position. However, where the employer refuses to accept employee initiated duties as required duties (e.g., in the review procedure, or in response to the presentation of a classification grievance) the adjudicator, in any case of doubt, should be guided by the duties

and responsibilities which, as indicated by the job description or otherwise, the employee is required to perform. To proceed on any other basis would clearly contravene the principle that authority to assign duties and responsibilities is vested in the employer.

279. Where a major revision is made in a standard, a substantial number of positions in an occupational group that was reclassified may have to be converted to the new standard. The implementation of the revised standard may disclose unforeseen difficulties that have to be overcome over a period of time and there may even have to be modifications in the standard to surmount practical problems that come to light. It is therefore recommended that the Board should be empowered, on application by the employer, to defer adjudication of classification grievances relating to positions in any occupational group that was reclassified under the revised standard for a period to be determined by the Board. It is the intent of this recommendation that the rights of the employee would be preserved in case of such a deferment, but the enforcement of the employee's rights would be postponed in the anticipation that inequities in the standard or in its application that have come to the attention of the parties during the conversion would be rectified and thus avoid the need for a third-party determination.

280. A number of limitations should be imposed on the right of an employee to have recourse to third-party determination of his classification grievance. An employee should be entitled to process a classification grievance through the various levels on his own initiative, but should not be entitled to process it to adjudication

without the consent of the bargaining agent. The rationale for this recommendation is that, if classification standards had been made bargainable, grievances arising from any standard that had been dealt with in bargaining would be subject to adjudication only if the reference to adjudication were endorsed by the bargaining agent. Classification standards are intricately interwoven with so many facets of the employer-employee relationship in the Public Service that the interest of the individual in a particular instance may not be capable of being readily divorced or segregated from those of other employees. Indeed, an individual grievance may conceivably raise questions about the standard as a whole or some important element of a standard.

281. It is also recommended that, where a request for the review of a classification decision has been made by an employee and he has not thereafter presented a grievance relating thereto within the time limited by the relevant regulations of the Board, or where a classification grievance has been processed by him to adjudication and dealt with on its merits, the employee concerned should be barred from presenting a further grievance in respect of the same classification action unless he can establish that a material change has occurred in the situation.

282. In the history of labour relations legislation, any transitional period is a difficult one and lines have to be drawn between remedies available for past "injustices" and those available for what is done after the legislation becomes operative. If the recommendations made in this report on classification

grievances are accepted and embodied in legislation, there may well be a considerable number of requests for review of classification action as well as classification grievances pending at the time of the coming into force of the revised legislation. It is recommended that all of these requests and grievances be carried to a conclusion under the existing machinery and that employees who have sought redress under the existing procedures be barred from resorting to the new remedies except in those instances where the request for review was made not more than 45 days before the legislation comes into force.

283. The foregoing recommendations on classification grievances are confined to grievances presented by those who are employees included in a bargaining unit for which a bargaining agent has been certified. They do not apply to persons identified as being employed in a managerial or confidential capacity or to employees who are not represented by a bargaining agent. I have given consideration to the advisability of extending the rights that would be conferred upon employees by these recommendations to persons employed in a managerial or confidential capacity. It may be well to set out here some of the considerations that should be taken into account in seeking an answer to the problem.

284. Although persons employed in a managerial or confidential capacity now enjoy the right to request review of classification decisions concerning their positions and also to present classification grievances, they are not entitled to process such grievances to adjudication. To extend to such persons the right to refer

classification grievances to adjudication would involve giving to them a right which, apart from grievances arising out of disciplinary action, they do not now have. The extension would go far beyond anything provided for under private sector legislation. It could, of course, be said that the recommendation for adjudication of classification grievances presented by employees, since any rights so conferred would derive directly from the statutory provision in that regard and not indirectly from a collective agreement, also goes beyond what is provided for under private sector legislation. However, that recommendation is made in lieu of including classification standards within the scope of bargainable issues. In so far as employees not represented by a bargaining agent are concerned, even if classification standards were made bargainable, any advantages that might accrue to anyone from that fact would apply only to bargaining unit employees. It is for that reason, and because of my conclusion concerning the role that might be played by a bargaining agent in dealing with classification grievances, that my recommendation also excludes employees who are not represented by a bargaining agent.

285. The matter may, however, be looked at from another point of view. Persons employed in a managerial or confidential capacity and employees not represented by a bargaining agent now do have the opportunity of requesting that their classification be reviewed by a classification review board if they are dissatisfied with the decision of a classification officer. It is highly improbable that this traditional entitlement of managerial and confidential personnel and employees not represented by a bargaining agent would be withdrawn

by the employer if the recommendation in this report regarding classification grievances were adopted. What would come about, then, would be that two processes for dealing with classification "grievances", one for employees represented by a bargaining agent and the other for employees not so represented and for persons employed in a managerial or confidential capacity, would operate side by side and might conceivably lead to conflicting results concerning a single standard equally applicable to both types of public servants. This state of affairs may arise with some degree of frequency in cases where a standard applies to an employee not represented by a bargaining agent or to a person identified as being employed in a confidential capacity, and particularly so in the lower levels. On the other hand, where persons in the upper levels of management are involved, the subjective element in any evaluation of the soundness of the application of a classification standard to a particular individual is such a dominant factor that third-party determination of a grievance referred by such a person takes on a quality of unreality.

286. The foregoing considerations lead me to suggest that the resolution of the problems I have posed here should be left to the employer to determine whether or not the recommendations regarding classification grievances should be applied to persons not included in bargaining units and to managerial and confidential personnel and, if they are not applied, the nature of the review process that should be available to such persons.

287. Grievances relating to environmental factors: It will be recalled that Chapter 4¹⁸ contains the recommendation that terms

and conditions of employment concerning environmental matters should not be made arbitrable. Nevertheless, a general principle should apply that, where a matter is bargainable but not arbitrable, the legitimate interests of the employees affected should be protected, if such protection can be accorded without doing violence to the relationship between the parties. The same principle could also very well apply to matters which are bargainable in theory, but where bargaining is impractical in practice. In line with this principle, an opportunity should be afforded to employees in bargaining units to carry to adjudication grievances alleging that the environmental conditions in which they are carrying out their duties at the time the grievance is presented are below the standard generally prevailing in the community in which they are employed or otherwise determined as being generally applicable to the Public Service,¹⁹ having regard to the nature of their occupation and the type of work performed. In the vast majority of cases, such grievances will come to a head because of negligence or inattention in a peripheral area of the government "empire," and the filing of a grievance will have the effect of bringing the undesirable condition to the attention of senior levels of management. Where machinery is available for discussion of a problem of the nature here under consideration through a "labour-management committee" of some sort, the proper approach for dealing with these problems should be by reference to such a committee in the first instance. This is especially the case in this area where significant progress has already been made through joint efforts.²⁰

288. Since the problem involved in the grievance may affect employees in several bargaining units, the adjudicator should be empowered, where such a grievance comes before him, to give notice to other bargaining agents representing employees who might be affected and to join them as parties in the proceedings before him. It must be recognized that there may be undesirable conditions the correction or elimination of which cannot be accomplished immediately. If, in the course of the proceedings before the adjudicator, the employer informs the adjudicator that a standard relating to the condition that gave rise to the grievance is in course of development or that the matter is under consideration by some joint body representative of the employer and the employees, the adjudicator should be vested with discretion to adjourn the hearing or postpone issuing a decision on the grievance for such length of time as may appear to him to be reasonable.

289. The jurisdiction of the adjudicator should be limited to a finding of fact as to whether the conditions do or do not fall below the community standard or the standard otherwise established. Where the finding is "in favour of the employee," the employer should be required to inform the Board, within such time limits as may be fixed by the Board, of the action, if any, it has taken or proposes to take to remedy the condition complained of. Because of the possibility of nuisance grievances in this area by hypersensitive individuals, and the implications of environmental grievances for other employees, such grievances should not be referable to adjudication without the concurrence of bargaining agents or by

persons who are not included in bargaining units.

290. There is always the possibility that an agreement may contain terms and conditions on environmental factors and that the remedy recommended above might produce a conflict between the provisions of a collective agreement and the statutory yardstick against which an adjudicator would have to measure the validity of a grievance of this nature. This possibility is so remote that it need not be given any appreciable weight. It is inconceivable that a collective agreement would call for environmental standards below those generally accepted in a community. It is not intended that grievances relating to environmental standards embodied in a collective agreement should be barred from being fully processed in accordance with the provisions of a collective agreement.

291. Grievances of designated employees: Since designated employees are forbidden to engage in a strike, they should be entitled to process grievances relating to occurrences or matters that take place during the course of a strike affecting their terms and conditions of employment and they are, of course, entitled to do so under subsection 90(1) of the Act. However, apart from grievances relating to disciplinary action, no employees are entitled to refer grievances to adjudication concerning occurrences after the expiry of the collective agreement. It is recommended that designated employees should be entitled to present grievances and process them to adjudication as if the collective agreement applicable to them had remained in force to the extent that the terms and conditions of employment contained in the collective agreement are applicable in the circumstances that

exist in the course of a strike.

292. Grievances arising during the period of bargaining: As was pointed out in Chapter 4,²¹ section 51 of the Act declares that existing terms and conditions of employment remain in force after the expiration of a collective agreement and until what was described as the bargaining process is completed. It has been suggested that during that period, any allegation that such terms and conditions have not been observed must be dealt with by way of a complaint to the Board. It is recommended that a provision similar to subsections 160(4) and (5) of the Canada Labour Code²² be included in the Public Service Staff Relations Act so as to entitle an employee to process to adjudication a grievance alleging non-observance of any term or condition of employment continued in effect under section 51 of the Act. A number of grievances of this sort have been referred to the Chief Adjudicator as persona designata by consent of the parties.²³ The matter should be regularized so that the rights of employees are not dependent on consent that may have to be obtained during the heat of a dispute. It is also recommended that an employee should be entitled to process a grievance in the circumstances set out in this paragraph if it is presented within the time limits fixed by the Board for the presentation of grievances, i.e., even if the grievance is first presented after the expiration of the period fixed by section 51 of the Act as amended.

Powers of Adjudicators

293. Attention has been drawn to the fact that, under the legislation as it stands, an adjudicator lacks authority to summon

witnesses or require the production of relevant documents, a state of affairs that may prejudice proper disposition of grievances referred to adjudication. In view of the recommendation made in Chapter 7 as to the restructuring of the Board, it is unnecessary to deal at this point with the question as to what authority adjudicators should have.

Procedure for Presenting Grievances

294. Subsection 99(1) of the Act empowers the Board to make regulations in relation to the procedure for presenting grievances. It reads as follows:

99. (1) The Board may make regulations in relation to the procedure for the presenting of grievances, including regulations respecting

- (a) the manner and form of presenting a grievance;
- (b) the maximum number of levels of officers of the employer to whom grievances may be presented;
- (c) the time within which a grievance may be presented up to any level in the grievance process including the final level;
- (d) the circumstances in which any level below the final level in the grievance process may be eliminated; and
- (e) in any case of doubt, the circumstances in which any occurrence or matter may be said to constitute a grievance.

However, subsection 99(2) declares that any regulations that may be made by the Board in relation to the procedure for the presenting of grievances are superseded by provisions contained in a collective agreement that are inconsistent with regulations made by the Board. The Board has made regulations, pursuant to subsection 99(1), that provide comprehensively for the procedure necessary for presenting and processing grievances, whether or not a collective agreement

exists. However, there are to be found in the collective agreements that have been entered into in the Public Service a considerable number of variations of, and departures from, the P.S.S.R.B. Regulations and Rules of Procedure in this regard. In the result, employees in several bargaining units working side by side may have to process their grievances in different fashion and under differing time limits. Members of management in the same managerial hierarchy and charged with the duty and responsibility of dealing formally on behalf of the employer with grievances have been confronted with a variety of procedural rules that they are called upon to apply. In the interests of sound employer-employee relations, it would appear to be desirable to introduce a greater measure of uniformity into the process. It is therefore recommended that the Board should have the exclusive authority to make the necessary regulations. The provision spelling out the Board's authority to make such regulations should be so worded as to empower the Board not only to make regulations having general application, but also to issue orders applicable to particular bargaining units or departments or agencies. These orders should be made only on application of the parties and would vary the general regulations to meet special circumstances.

295. It has been suggested to me that one of the reasons for the inclusion of provisions in a collective agreement relating to grievance procedure is to apprise employees of the procedure they are expected to follow in presenting grievances. This objective is a laudable one, but can be achieved by including in every collective agreement an appendix setting out the regulations and, where

appropriate, any special orders made by the Board.

296. It would not be desirable to nullify any provision the parties may have included in any existing agreement. It is therefore recommended that, if the foregoing recommendation is accepted, it should not apply to any agreement in effect at the time of the coming into force of the revised legislation during the currency of such an agreement.

Enforcement of Adjudication Decisions

297. As we have seen, where a decision of an adjudicator requires that certain action be taken, section 96 of the Act declares that the employer, the employee or the bargaining agent, as the case may be, "shall take such action." Subsection 20(1) of the Act empowers the Board to examine and inquire into any complaint that anyone has failed to give effect to a decision of an adjudicator with respect to a grievance and to make an order directing the person at fault to give effect to the decision or to take such action as may be required in that behalf, within such period as the Board may consider appropriate. Where such an order of the Board is not complied with within the period specified, the Board is directed by section 21 of the Act to

forward to the Minister through whom it reports to Parliament a copy of its order, a report of the circumstances and all documents relevant thereto, and the copy of the order, the report and the relevant documents shall be laid by the Minister before Parliament within fifteen days after receipt thereof by him or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

298. Several of the bargaining agents proposed that the decision of an adjudicator should be filed in the Federal Court and be enforceable as an order of that Court, as is the case with the decision of an arbitrator under section 159 of the Canada Labour Code.²⁴ Nothing has come to my attention that would lead me to conclude that the sanction provided by section 21 of the Public Service Staff Relations Act is ineffective or inadequate. There has not been a single instance since that Act came into force in which the Board has found it necessary to issue an order directing compliance with a decision of an adjudicator, and in fact during the entire period there have been only very few cases in which such an order was sought. There have been instances in which the employer has refrained from complying with a decision of an adjudicator pending a reference to the Board under section 23 of the Act of a question of law or jurisdiction that has arisen in connection with an adjudicator's decision. Recommendations will be found in Chapter 7²⁵ concerning that section. I do not recommend that any alteration be made in the existing enforcement procedure established by section 20 and 21.

Some Concluding Comments on Rights Disputes

299. The view generally entertained by many practitioners in the labour relations field is that rights disputes must be dealt with in a quasi-judicial atmosphere, that, where one party alleges the other has failed to observe an obligation imposed upon it by the terms of a collective agreement or by law, the sole concern of the parties should be to ascertain whether a legal right has or has not been infringed. To my mind, this view overlooks a fundamental

characteristic of the employer-employee relationship in a collective bargaining context - that the relationship must continue in effect notwithstanding that there has been a breach of the collective agreement, even if the breach goes to the heart of the agreement.

300. In everyday litigation arising out of the breach of a contract, there has usually been a complete rupture of the contractual relationship or there is no obligation on the parties to continue the relationship beyond a fixed point of time if either of them is dissatisfied with the result of the litigation. For all practical purposes, except in the case of "decertification" or the certification of a new bargaining agent, there can be no "escape" either for an employer or a bargaining agent from the obligation to continue to bargain in the future. To win the battle and lose the war because of an adjudicator's decision, which must of necessity be based on the language of the agreement itself, may be small comfort to either party.²⁶ It should be borne in mind that adjudicators' decisions are subject to review by the courts who are prone to apply the principle that "the recognized canons of construction applying to deeds, contracts or other instruments" are binding on arbitrators.²⁷ The realization that collective agreements are sui generis has led some arbitrators to hold, to put it in the words of Professor (now Dean) H.W. Arthurs in his arbitration award in the Port Arthur Shipbuilding Case,²⁸ that "Although the common law may provide guidance, useful analogies, even general principles, the umbilical cord has been severed and the new doctrines of labour arbitrators have begun to lead a life of their own." This view had the support of Mr. Justice

Laskin, now Chief Justice of the Supreme Court of Canada, as is evident from his judgment when the Port Arthur Shipbuilding Case was before the Ontario Court of Appeal. I am not so bold as to say that this approach to the interpretation of collective agreements is capable of being incorporated in a statute. It will have to await developments in the courts of this land.

301. None the less, having in mind the nature of the collective bargaining relationship, I am firmly convinced that every effort should be made by the parties to avoid having their differences resolved by litigation. I would therefore suggest that the parties should establish machinery at the highest level to review jointly grievances referred to adjudication before they are heard by an adjudicator, with a view to ascertaining whether an acceptable solution can be worked out. Review or screening committees of this sort have functioned well in the private sector and one can reasonably anticipate that they would serve a useful purpose in the public sector as well.

FOOTNOTES

1. Section 112 of the Act reads as follows:

112. (1) Nothing in this or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

(2) For the purposes of subsection (1), any order made by the Governor in Council is conclusive proof of the matters stated therein in relation to the giving or making of any instruction, direction or regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

2. See, for example, MacGregor (Adjudication file 166-2-672), Dunaenko (Adjudication files 166-2-523 and 546).
3. See, for example, the Maloughney Case, Board file 168-2-47.
4. Cf. paragraph 329.
5. This section of the report does not apply to probationary employees, except as indicated in paragraph 113.
6. For example, see Selected Appeal Board Decisions, Case 53, Issue 4, p. 7; Case 451, Issue 25, p. 3; Case 492, Issue 27, p. 3; Case 549, Issue 30, p. 1.
7. See, for example, Munro (Adjudication file 166-2-78); Dunaenko (Adjudication files 166-2-523 and 546); Cooper (Adjudication file 167-2-11); Washbrook (Adjudication file 166-2-133).
8. See Wright Case, Board file 168-2-16, and decision of the Federal Court of Appeal in Re Wright and Attorney General of Canada, [1973] F.C. 765.
9. An attempt at clarification was made by the Chief Adjudicator in Robertson (Adjudication file 166-2-454) at pp. 15-17:

The responsibility for disciplinary standards and penalties has been vested by statute in Treasury Board, not in the Public Service

Commission. Secondly, Treasury Board has sought to meet that responsibility by making the general rules in Section 106, delegating considerable authority to 'a deputy head.' Thirdly, both the Statute and Section 106 expressly refer to penalties for breaches of discipline or misconduct. Those words embody the concept of fault, that is to say: either wilful wrong-doing or culpable negligence, either of which can have penal consequences. I think the words do not include such failings or deficiencies as involuntary incompetence or incapacity (or infancy or old age) which clearly lack the element of voluntary malfeasance.

My view is that the 'disciplinary action' referred to in Section 91(1)(b) of the Public Service Staff Relations Act is such action as is taken in response to alleged 'breaches of discipline or misconduct' - in other words, in response to what the Employer considers to be some kind of voluntary malfeasance, by whatever name it may be called in an office file.

For clarity, I must add that in some circumstances incompetence or incapacity may be due to voluntary malfeasance and have disciplinary consequences. If an employee abstains from making the effort required of him when he is capable of making such an effort, or making a better effort, the resulting 'unsatisfactory performance' may well attract attention - and a penalty. In such a case, however, it is the voluntary abstention rather than the poor performance which is culpable and may constitute just cause for disciplinary action.

Read together, the language of the three statutes seems to signify that 'breaches of discipline and misconduct' relate to voluntary malfeasance, and the major penalties resulting therefrom (and imposed by or on behalf of Treasury Board) are referable to adjudication; on the other hand, disabilities, defects or failings of an involuntary character are not subject to disciplinary action but may lead to termination in various forms or to demotion (decided upon by the deputy head or the Commission) which in some cases are subject to appeal and in other cases are not.

The essential distinction is between that which is voluntary, or within the employee's control, and that which is involuntary, being not within the employee's control or capacity.

10. See, however, supra, footnote 5.

11. Section 32 of the Public Service Employment Act is as follows:

32. (1) No deputy head and, except as authorized under this section, no employee, shall
(a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or
(b) be a candidate for election as a member described in paragraph (a).

(2) A person does not contravene subsection (1) by reason only of his attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1)(a) or money for the funds of a political party.

(3) Notwithstanding any other Act, upon application made to the Commission by an employee the Commission may, if it is of the opinion that the usefulness to the Public Service of the employee in the position he then occupies would not be impaired by reason of his having been a candidate for election as a member described in paragraph (1)(a), grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.

(4) Forthwith upon granting any leave of absence under subsection (3), the Commission shall cause notice of its action to be published in the Canada Gazette.

(5) An employee who is declared elected as a member described in paragraph (1)(a) thereupon ceases to be an employee.

(6) Where any allegation is made to the Commission by a person who is or has been a candidate for election as a member described in paragraph (1)(a), that a deputy head or employee has contravened subsection (1), the allegation shall be referred to a board established by the Commission to conduct an inquiry at which the person making the allegation and the deputy head or employee concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission,

(a) in the case of a deputy head, shall report the decision to the Governor in Council who may, if the board has decided that the deputy head has contravened subsection (1), dismiss him; and

(b) in the case of an employee, may, if the board has decided that the employee has contravened subsection (1), dismiss the employee.

(7) In the application of subsection (6) to any person, the expression "deputy head" does not include a person for whose removal from office, otherwise than by the termination of his appointment at pleasure, express provision is made by this or any other Act.

12. Section 27 of the Public Service Employment Act is as follows:

27. An employee who is absent from duty for a period of one week or more, otherwise than for reasons over which, in the opinion of the deputy head, the employee has no control or otherwise than as authorized or provided for by or under the authority of an Act of Parliament, may by an appropriate instrument in writing to the Commission be declared by the deputy head to have abandoned the position he occupied, and thereupon the employee ceases to be an employee.

13. [1969] S.C.R. 85, (1968), 70 D.L.R. (2d) 693.

14. Supra, footnote 3.

15. S.C. 1972, c. 18.

16. As yet unreported.

17. S.N.B. 1968, c. 88.
18. Cf. paragraph 229.
19. Such as those set out in Treasury Board circulars on environmental health and hazards.
20. The following is a list of some of the standards:

<u>Subject</u>	<u>T.B. Circular No.</u>	<u>Date of Issue</u>
General First Aid Standards	1969-35	April 9, 1969
Boiler and Pressure Vessel Standard	1969-199	December 10, 1969
First Aid Standard for Field Operations and Isolated Parties	1970-23	February 2, 1970
Standard for the Provision of Health Units and Nursing Counsellor Services	1970-89	August 11, 1970
Investigation, Reporting and Recording of Accidents and Injuries	1970-117	October 28, 1970
Elevating Devices Standard	1971-63	May 21, 1971
Periodic Health Examination Standard	1971-93	June 30, 1971
Pesticide Safety Standard	1971-111	July 26, 1971
Noise Control and Hearing Conservation Standard	1972-10	January 26, 1972
Machine Guarding Standard	1972-38	March 17, 1972
Motor Vehicle Operation Standard	1972-49	April 5, 1972
Hazardous Confined Spaces Standard	1972-94	July 31, 1972
Temporary Work Structures Standard	1972-95	August 2, 1972
Hand Tools and Portable Power Tools Standard	1972-96	August 4, 1972
Field Operations Safety Guide	1972-115	September 29, 1972
Dangerous Substances Standard	1973-7	January 19, 1973
Personal Protective Equipment Standard	1973-8	January 22, 1973

21. Cf. paragraph 179.
22. Supra, footnote 15.
23. Cf. paragraph 256.
24. Supra, footnote 15.
25. Cf. paragraphs 357 ff.

26. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties ... [T]he institutional characteristics ... of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement." Archibald Cox, "Reflections Upon Labor Arbitration," (1959) 72 Harv. L. Rev. 1482 at 1498.
27. See Schroeder J.A., of the Ontario Court of Appeal in the Port Arthur Shipbuilding Case, [1967] 2 O.R. 49, at p. 53, 62 D.L.R. (2d) 342, at p. 346.
28. (1966) 17 L.A.C. 109, at p. 112.

Chapter 6

MISCELLANY

302. There are quite a number of matters that do not lend themselves to any systematic arrangement which would make it possible to group them under a broad general heading. It is my intention in this chapter to deal with those that can be tied to the present legislation, more or less in the same order as they are to be found in the legislation.

Basic Freedoms, Prohibited Practices and Related Matters

303. These topics are now dealt with in sections 6, 8, 9 and 10 of the Public Service Staff Relations Act. The language of these sections differs somewhat from the language that is to be found in comparable sections of the Canada Labour Code.¹ It is recommended that, generally speaking, the provisions of these sections be reworded to conform with the relevant provisions in the Code with necessary modifications to accommodate the language to conditions in the Public Service. With certain exceptions, it is not necessary to spell out the modifications in detail in this report. On the other hand, some provisions of the Canada Labour Code are not appropriate to the Public Service.

304. Section 161 of the Canada Labour Code² permits the parties to a collective agreement to introduce therein a provision

- (a) requiring, as a condition of employment, membership in a specified trade union; or

- (b) granting a preference of employment to members of a specified trade union.

There is no history of discrimination against employees in the Public Service because of their being involved in union activity and there does not appear to be any need in the Public Service of Canada to protect the organizational security of employee organizations. Accordingly, it is recommended that the greatest degree of union security that may be bargained for by a certified bargaining agent should be "maintenance of membership," as is the case now under the Public Service Staff Relations Act.

305. It is also recommended that there be included in the "prohibited practices" provisions a clause imposing on a bargaining agent a duty of fair representation in processing grievances. There is a subparagraph in the Canada Labour Code³ which protects an employee who has been expelled or suspended from membership in a trade union for a reason other than the non-payment of dues; however, the clause is confined in its operation to expulsion or suspension from membership. It gives to an employee no protection should he be discriminated against by a trade union in the processing of a grievance. No employee in the Public Service should be left unprotected against an unfair decision being made by a bargaining agent as to whether his "rights" under a collective agreement should be enforced. This recommendation is not to be taken as implying that bargaining agents have been acting in bad faith in this regard. There have been only rare instances where there has been any suggestion that employees have not been given fair representation. However, there is no

effective legal remedy under the present legislation if such a situation should arise. In the absence of appropriate legislative provision, the isolated instances have been dealt with in the past by persuasion. It appears to be desirable that a legal remedy should be provided. It is not intended, however, that an employee should be able to compel a bargaining agent to process his grievance simply at his behest. The decision of a bargaining agent to withhold its consent to the processing of a grievance should not be capable of being upset where the bargaining agent has in good faith withheld consent.

306. The legislation should provide that the Board be empowered to direct, inter alia, where it finds that an employee has been denied fair representation, that the employee be entitled to present a grievance and carry it to adjudication, where adjudication is available, without the prior approval of the bargaining agent. In addition, the employer should be required to respond to such a grievance even though it is presented outside the time limits otherwise fixed for the presentation of grievances under the Act. Any monetary award made in respect of the grievance should be assessed against the bargaining agent to the extent to which the default of the bargaining agent resulted in the award being larger than it might otherwise have been.

307. It is recommended that there be included in the legislation a provision, similar to that contained in the Canada Labour Code⁴ permitting an employee who is represented by a bargaining agent to authorize the employer in writing, at any time after the date on which the bargaining agent becomes entitled to represent him, to

deduct from his wages the amount of the regular monthly membership dues payable by him to the bargaining agent. Such an authorization should be revocable. As is the case under the Canada Labour Code, this provision should not be applicable where the employee is bound by requirements in a collective agreement to have his membership dues or an equivalent deducted from his salary or wages.

Limited Type of Membership for Certain Public Servants

308. Several of the employee organizations active in the Public Service have a quality that distinguishes them from other employee organizations, in that among their primary purposes are the enhancement of the professional interests of their members and the advancement of professional goals and achievements. Thus, the Professional Institute of the Public Service of Canada was, in its origin, strictly an organization created for that purpose. I understand that, with the advent of collective bargaining legislation, it amended its constitution to enable it to qualify as an employee organization under the Public Service Staff Relations Act. However, it retained much of its professional character. The Professional Association of Foreign Service Officers is another organization in which the protection of the professional status and standards of its members is not regarded as secondary to the protection of their terms and conditions of employment.⁵ I hold the opinion that it is desirable to preserve and even strengthen the professional character of the employee organizations in the Public Service to the extent to which this can be done while ensuring that their activities are compatible with the fundamental purposes of the legislation.

309. One of the problems confronting those employee organizations in the Public Service that hold the advancement of the professional interest of their members to be of paramount importance is that the proportion of persons identified as being employed in a managerial or confidential capacity in the occupational groups they represent in collective bargaining is often much higher than is the proportion of such persons in many other occupational groups.⁶ The situation is complicated by the constant shift of employees in some of these occupational groups from non-management to management positions and vice versa, a situation which has few, if any, parallels in the private sector. There is a continuing need and desire by persons so identified to maintain their attachment to these organizations for purposes that are unrelated to the collective bargaining process. To exclude such persons from membership in employee organizations not only denies them an important opportunity for significant professional development, but it also tends to diminish the capacity of these organizations to stimulate important professional interests, a state of affairs detrimental to the Public Service.

310. These circumstances suggest a need to recognize a limited type of membership for persons identified as being employed in a managerial or confidential capacity and to ensure that persons who hold such a limited form of membership are not to be treated as contravening the unfair practice sections of the legislation. However, it is essential that adequate safeguards be provided to avoid a potential conflict of interest. It is therefore recommended that such a person be permitted to retain a form of membership⁷ in an

employee organization of which he was a member at the time he was identified as a person employed in a managerial or confidential capacity upon the following conditions:

- (a) The type of membership retained should preclude such a person from participating in, or voting on, any matter connected with any aspect of collective bargaining or consultation provided for by the Act, or with employer-employee relations, and from holding any office in the organization.
- (b) The conditions on which membership is to be retained should be clearly spelled out in the constitution of the organization in terms acceptable to the Board. However, for an interim period, if the relevant constitution does not contain such a provision, membership could be retained by a person notwithstanding the absence of an appropriate provision in the constitution, if he files with the Board, within such period as the Board may prescribe, a document binding himself to restrict his activities in the organization in the manner indicated above. The interim period should not extend beyond the date of the constitutional convention of the employee organization concerned next following the coming into force of the revised legislation.

Persons employed in a managerial or confidential capacity who, at the time the revised legislation comes into force, are members of an employee organization, should be entitled to retain their membership on the same basis as those who are identified after the amended legislation comes into force. The legislation should make it an improper practice for a person to contravene an undertaking given in accordance with (b) above. Persons identified as employed in a managerial or confidential capacity should not retain the right they presently have to invoke the assistance of an employee organization

in processing their grievances except for grievances that arose prior to the time when the person was identified.

Issues Concerning Representation of Employees
by a Bargaining Agent

311. During the initial certification period, objection was taken in a number of cases to the certification of an international trade union or a branch of an international trade union on the ground that the policies of such a union might be controlled by officers and members of the union who were not public servants. Every one of such trade unions that applied for certification assured the Board that the collective bargaining policies of the union, in so far as matters involving the interest of public servants were concerned, would be controlled in their entirety by those members who were public servants. The Board expressed the opinion in one of its early decisions⁸ that, if these assurances were not observed, there was authority vested in the Board to revoke the certification. It is recommended that any possible doubt that there may be on this score should be removed by the inclusion in the legislation of a provision that would require such an assurance to be given and by providing a remedy if the assurance is not observed.

312. The Board has held that, under the Act as it stands, an employee organization that applies for certification must establish that it has as members approximately 50% of the employees in an appropriate bargaining unit to entitle it to have a representation vote directed to ascertain the wishes of the employees. The Canada Labour Code,⁹ and the statutes of a number of the provinces, have

established a new threshold for the number of members an employee organization must have to be entitled to test the wishes of the employees by a representation vote, where there is no other bargaining agent. The figure fixed in the Canada Labour Code is 35%. It is recommended that the Public Service Staff Relations Act be amended to conform with the Code in this respect.

313. The Public Service Staff Relations Board has also held, as did the Canada Labour Relations Board under the Industrial Relations and Disputes Investigation Act,¹⁰ that, where a representation vote is directed, an employee organization must win the support of a majority of all employees eligible to vote in order to be certified. The Canada Labour Code now declares that the result of a representation vote is to be determined on the basis of the ballots cast by a majority of employees voting, provided that not less than 35% of eligible voters have cast ballots. It is recommended that the formula for determining the result of a vote set out in the Canada Labour Code be incorporated in the Public Service Staff Relations Act.

Merger of Existing Bargaining Units¹¹

314. Section 32 of the Act confers upon the Board authority to determine what constitutes an appropriate bargaining unit. Under the Act, once a bargaining unit has been determined and a certificate issued to a bargaining agent, the parties are bound by that determination until the Board (a) is called upon to deal with another application for certification for all or some of the employees in the unit determined in the original certificate, and (b) has found

another unit to be appropriate. Under the Act as presently structured, it is impossible for the parties to agree to change the description of the bargaining unit as set out in the certificate. Section 26(4) of the Act bound the Board to determine bargaining units within predetermined occupational groups specified by the Public Service Commission under subsections (1) and (2) of section 26 of the Public Service Staff Relations Act. There are some situations where a merger of existing bargaining units may be advantageous to all concerned. At the present time, the legislation does not permit the parties to combine several bargaining units unless a new application for certification is made which proposes a new unit consisting of the employees of several of the present bargaining units. An application of this nature may involve a considerable disruption in the relationship between the parties. It is recommended that the Board be empowered to combine existing units, the employees in which are represented by the same bargaining agent, without the need for a new application for certification, where (a) the application for such a merger is made with the consent of both parties, and (b) the Board is satisfied that the bargaining between the parties would be furthered by such a combination.

315. This recommendation may raise in the minds of some employees the fear that, in dealing with an application for merger of bargaining units, the Board would consult solely the desires and convenience of the bargaining agent and the employer and would pay no attention to the interests of employees in the several bargaining units concerned, which could conceivably differ from those of the

parties themselves. It should therefore be pointed out that, if an application for merger were to be made, it would be the normal practice, in accordance with what are referred to as the principles of natural justice, for the Board to cause notices of the application to be posted in conspicuous places where all the employees concerned were located and that an opportunity would be afforded to employees to make representations to the Board in opposition to the application, if they desired to do so. In arriving at a decision on such an application, the Board would, of course, take into account any representations that individual employees or groups of employees might see fit to make.

316. The Board should have authority to determine, in the absence of agreement between the parties, how the several collective agreements relating to the previous units are to be consolidated and what adjustment of rights may be necessary to enable one agreement to be made applicable to the new merged unit. The Board should have authority to permit some of the agreements to be terminated before their normal expiration date and also to set a date when notice to bargain could be given on behalf of the employees in the combined unit, notwithstanding that the date for the giving of notice under the several agreements governing the previously established units had not been reached.

Dissolution of Council of Employee Organizations

317. Section 44 of the Act empowers the Board to revoke the certification of a council of employee organizations where, by reason of an alteration in the constituent membership of the council or

any other circumstances, the council no longer meets certain requirements. Where certification is revoked under this section, none of the constituent members of the council retain any bargaining rights¹² and any one or more of the constituent members can acquire bargaining rights as bargaining agent for any of the employees in the units only by making a new application for certification. One may speculate that the authors of the Public Service Staff Relations Act sought to make it risky for a council of employee organizations which had been certified to dissolve, in the hope that the risks involved would deter hasty action on the part of the constituent members of a council. It may well be that employee organizations felt driven to create councils because of their belief that that was the only way to meet the requirements of subsection 26(4) of the Act, which established predetermined occupational groups that the Board had to look to in determining the composition of bargaining units during what was known as the initial certification period. There are grounds for believing that some of the "marriages" are not particularly happy ones and that, in the interest of effective collective bargaining, they should not be compelled to continue. Under the legislation as it stands, "divorce" is hazardous.

318. The legislation of some jurisdictions in Canada permits the retention of bargaining rights by a constituent member of a council of trade unions that ceases to be a member of or affiliated with a council that has bargaining rights. It is recommended that the Board be empowered to determine, on application by the employer, a council of employee organizations, or any constituent member of

such a council, whether any constituent member of such a council should retain any bargaining rights in case of dissolution of the council and, if so, to determine what the appropriate bargaining units should be and what ancillary rights should be vested in or retained by any of the members of the dissolved council. As in the case of the recommendation concerning merger of bargaining units, the employees in the bargaining unit would be afforded an opportunity to make representations concerning the disposition of such an application.

Effect of Reclassification on
Composition of Bargaining Units

319. A principle commonly embodied in labour relations legislation is that the authority charged with the responsibility for administering the legislation, usually a labour relations board or commission, is empowered to determine the appropriateness of bargaining units. Some statutes set out guidelines to be observed or considered by the authority; some are silent on that score. The Public Service Staff Relations Act provided for the predetermination by the Public Service Commission, on the basis of the program of classification revision undertaken by the Civil Service Commission prior to the coming into force of the Public Service Staff Relations Act, of occupational groups within five occupational categories in such manner as to comprise therein all employees in the Public Service in respect of whom Her Majesty as represented by the Treasury Board was the employer. The Board was then directed that, during the initial certification period which lasted for about two

years, it was to adhere in its determination of bargaining units to the specified occupational group design, with certain qualifications not here relevant. As to the determination of bargaining units after the initial certification period came to an end, the Board is bound by section 32 of the Act (a) to "take into account, having regard to the proper functioning of [the] Act, the duties and classification of employees in the proposed bargaining unit in relation to any plan of classification as it may apply to the employees in the proposed bargaining unit," and (b) not to include in a bargaining unit any employee "who is performing duties or is entrusted with responsibilities that relate to an occupational category other than the occupational category to which the duties performed by and responsibilities entrusted to the other employees in that unit relate." In so far as bargaining units of employees in the central administration - those in respect of whom the Treasury Board is the representative of Her Majesty - are concerned, all certificates issued by the Board during the initial certification period defined such units in terms of the employees classified as coming within a certain specified occupational group.

320. Since, under the recommendations set out in Chapter 3, power to classify employees is to be left ultimately within the exclusive jurisdiction of the employer, it could be argued that if the employer were to reclassify employees who, at the time of certification had been included in one occupational group, so that they fall within another occupational group, the reclassified employees would be transferred by the unilateral action of the

employer from one bargaining unit to another and thus undo the Board's determination. So also if the employer were to reclassify some employees in such manner that they would not fall into any of the occupational groups specified in 1967, or if the employer were to enter upon a new function and recruit new employees whom it classified so as not to fall within any of the specified occupational groups. In circumstances of this sort, questions are likely to arise as to the unit, if any, in which such employees are included and as to how the classification action of the employer affects the bargaining rights of some of the bargaining agents.

321. It is doubtful whether section 33 of the Act, to which reference will be made in paragraph 322, confers upon the Board adequate authority to deal satisfactorily with a situation such as is described above. It is therefore recommended that, where by reason of classification action on the part of the employer, the employer or a bargaining agent alleges that the entitlement of an employee organization to represent any substantial group of employees in the Public Service is affected, the Board should have authority to determine whether the employees are included in any bargaining unit for which a bargaining agent has been certified, or whether they are not included in any unit. The Board should also be empowered in dealing with such a situation to make such inquiries, examine such records, hold such representation votes as it deems necessary, to amend or vary any certificates it may have issued, issue new certificates and issue such orders concerning the rights of the employer, the employees and the bargaining agent or agents

as it may deem appropriate.

"Acting Appointments"

322. Section 33 provides that where, following the determination by the Board that a group of employees constitutes a bargaining unit, any question arises as to whether any employee is or is not included in that bargaining unit or is included in another unit, the Board shall determine the question. One cluster of cases that has come before adjudicators, and before the Board on a reference under section 23 of the Act, involving a question of this sort relates to what are known as "acting appointments." Section 27 of the Public Service Employment Regulations declares:

(1) Subject to subsection (2), where an employee is required by the deputy head to perform for a temporary period the duties of a position having a higher maximum rate of pay (hereinafter referred to as the "higher position"), than the maximum rate of pay for the position held by him, the employee shall be considered to have been appointed to the higher position in an acting capacity, and

(a) if the higher position is classified in the occupational category referred to in the Public Service Staff Relations Act as the operational category and the temporary period is four months or more,

(b) if the higher position is classified in the occupational category referred to in that Act as the administrative support category and the temporary period is three months or more, or

(c) if the higher position is classified in an occupational category other than an occupational category mentioned in paragraphs (a) and (b) and the temporary period is two months or more,

the employee shall be deemed, for the purpose of sections 12¹³ and 41,¹⁴ to have been appointed to the higher position without competition, effective as of the last day of,

- (d) in the case mentioned in paragraph (a), the period of four months from,
- (e) in the case mentioned in paragraph (b), the period of three months from and
- (f) in the case mentioned in paragraph (c), the period of two months from the day on which he commenced to perform the duties of the higher position.

(2) An appointment to a position in an acting capacity shall not be made for a period of more than twelve months unless authorized by the Commission in any case or class of cases.

If the acting position is one the previous holder of which was in the same bargaining unit as his replacement, any problems as to his rate of remuneration or other terms or conditions of employment are governed by the collective agreement pertaining to that unit. However, on quite a few occasions, the acting position to which the employee is appointed calls for the performance of duties assigned to employees in another occupational group or even in another occupational category. An employee's incumbency of an acting position may be of relatively short duration and he may then, and often does, return to his "original" position. The question arises as to whether the collective agreement governing the bargaining unit to which the "acting appointee" previously "belonged" or the collective agreement governing the unit of the employee he is replacing is to apply to him as determining certain terms and conditions of employment applicable to him. Where the rights and obligations of the parties and of the employee flow across bargaining unit boundary lines, it appears to be desirable to link his rights and obligations to his immediate milieu and to deal with them by statutory provisions

rather than leave them to the collective bargaining process.

323. It is therefore recommended that the legislation should provide as follows:

- (a) The terms and conditions of employment of an acting employee should be governed, save as set out below, by the collective agreement applicable to the "acting position."
- (b) If the collective agreement appropriate to the "acting position" fixes a waiting period until the end of which an employee is not entitled to receive acting pay, the acting appointee should not receive acting pay until the end of that period. If he continues to hold the "acting position" beyond this waiting period, the rate of pay he receives for the "acting position" should be determined by the agreement appropriate to the "acting position."
- (c) If there is a check-off provision applicable to employees in the unit for the position which the acting appointee held at the time of his appointment, the employer should continue to check off his dues in accordance with that agreement and should transmit them to the bargaining agent for that unit for a period of 60 days next following the end of the month in which he was given the acting appointment.
- (d) The bargaining agent for the unit of which he was a member at the time he received the acting appointment should be obliged to process a grievance with respect to any claim the employee was entitled to present up to the time he was given the acting appointment.
- (e) The bargaining agent for the unit appropriate to the "acting position" should be obliged to process a grievance with respect to any claim the acting appointee was entitled to present during the time he was serving in the "acting position."

- (f) If, during the period that he is serving in the "acting position," his employment in the Public Service or in the "acting position" is terminated, the acting appointee should be deemed to have reverted to his former position and his entitlement to notice, severance benefits and related matters should be determined according to the provisions of the collective agreement applicable to the unit appropriate to his former position.

Political Contributions

324. The Canadian Union of Postal Workers and the Letter Carriers Union of Canada both sought a change in subsection 39(2) of the Act, alleging that it is "a restriction to the right of any Canadian collectively or as an individual to participate in the political life of Canada" and that it runs counter "to generally accepted principles of freedom and democracy." Subsection 39(2) is as follows:

The Board shall not certify as bargaining agent for a bargaining unit, any employee organization that

- (a) receives from any of its members who are employees,
- (b) handles or pays in its own name on behalf of members who are employees, or
- (c) requires as a condition of membership therein the payment by any of its members of,
any money for activities carried on by or on behalf of any political party.

The subsection must be read along with subsection 42(2):

Where the Board, upon application to it by the employer or any employee, determines that a bargaining agent would not, if it were an employee organization applying for certification, be certified by the Board by reason of a prohibition contained in section 39, the Board shall revoke the certification of the bargaining agent.

325. An examination of the Proceedings of the Special Joint Committee of the Senate and House of Commons on Employer-Employee Relations in the Public Service of Canada, 1966-67, reveals that, when these subsections were being considered by the Joint Committee, it was agreed that they be discussed together with similar clauses in the Public Service Employment Act,¹⁵ that there was an informal discussion on the matter at a meeting of the Committee held in camera, and that subsequently the clauses were agreed upon without further debate. There are political implications here of such a nature that I do not think it would be proper for me to make any recommendations on the proposals of the two employee organizations referred to in paragraph 324.

Some Problems Concerning Implementation and
Modification of Collective Agreements and
Arbitral Awards

326. Paragraph 56(1)(b) of the Act provides that, where no period for implementation is specified in a collective agreement, the agreement shall be implemented within 90 days from the date of its execution or within such longer period as may appear to the Board, on application to it by either party, to be reasonable. The wording of the paragraph does not encourage the parties to agree to an extension of time for implementation where it becomes obvious that an extension may be necessary. Indeed, even if they were to agree, such agreement might not be binding on the employees in the bargaining unit concerned. It is recommended that the paragraph should be amended to state that the parties may agree to an extension with-

out the need for recourse to the Board.

327. The phrasing of subsection 57(3)¹⁶ of the Act inhibits the parties to a collective agreement from amending or revising the provisions of the agreement during its lifetime. Deficiencies in an agreement may not become apparent until some time after it has been entered into. The parties should not be tied by law to provisions which they jointly agree are unworkable or are detrimental to their common interest or to the interest of either of them when they are in agreement as to the changes that ought to be made. It would appear to be desirable that the parties should be free by mutual consent to alter any provision of a collective agreement during its lifetime, except the provision relating to its duration. A provision to this effect is now contained in subsection 160(1) of the Canada Labour Code.¹⁷ It is recommended that the Public Service Staff Relations Act should be amended to conform with the Canada Labour Code in this respect.

328. It is also recommended that changes be made in the appropriate sections of the Public Service Staff Relations Act relating to the implementation of arbitral awards and the alteration of arbitral awards to permit the parties by mutual consent to extend the time for implementation of such awards and to alter any provision of an award other than a provision relating to its duration.

329. At several points throughout this report, suggestions have been made that certain matters could best be dealt with by coalition bargaining, that is to say, by bargaining either between

the employer and one bargaining agent acting on behalf of the employees in several bargaining units or between the employer and several bargaining agents. It may be difficult to carry on effective coalition bargaining where the several agreements binding on the parties have different expiration dates. If the recommendations made in paragraphs 327 and 328 with regard to the alteration of collective agreements and arbitral awards during their lifetime are accepted, it would be possible in principle for the parties to reach agreement on a matter that had application to several bargaining units and then proceed to incorporate the provisions agreed upon in the collective agreements applicable to the units affected. If these agreements have different expiry dates, the matter that had been agreed upon in the coalition bargaining forum would be open for renegotiation as each of these agreements come up for renewal. One of the parties in the coalition bargaining might be willing to assume an obligation only if the other party undertook that the bargain arrived at would remain in effect for a period of time that ran beyond the expiry date of some of the agreements involved. Such an undertaking, if given, would not be binding in law in the absence of statutory provision in that behalf. Coalition bargaining of the sort under discussion here would make for greater uniformity in the provisions of collective agreements covering like situations and would reduce the whipsaw effect that may come into play where there are a multiplicity of collective agreements governing terms and conditions of employment for employees of one employer. It is therefore recommended that, where the employer and a bargaining

agent representing employees in several bargaining units or the employer and several bargaining agents reach agreement on a provision that is to have common application to the employees in a number of bargaining units and they also undertake that these provisions are to be binding on them and on the employees in the several bargaining units for a fixed period of time, (a) the undertaking should be binding on the parties and the employees for the length of the period fixed in the undertaking notwithstanding that the several collective agreements might expire at dates earlier than the expiry date fixed in the undertaking, and (b) during the time the undertaking is in effect, its provisions should supersede any provision in a collective agreement that may thereafter be negotiated or any provision included in any arbitral award, for each separate bargaining unit, that is inconsistent with the undertaking.

330. Under section 54 of the Act, the Treasury Board "may, in such manner as may be provided for by any rules or procedures determined by it pursuant to section 3 of the Financial Administration Act, enter into a collective agreement with the bargaining agent for a bargaining unit, other than a bargaining unit comprised of employees of a separate employer, applicable to employees in that bargaining unit." In the case of a separate employer, section 55 of the Public Service Staff Relations Act provides that such an employer must have the approval of the Governor in Council to enter into a collective agreement. One of the separate employers has suggested to me that the requirement that such approval be obtained hampers bargaining agents and separate employers in negotiating

collective agreements suitable to their needs. The representatives of that separate employer contend that the procedure for obtaining approval gives to the Treasury Board, which is normally consulted in such matters, an opportunity for exerting an undue influence on the outcome. The representatives of this employer put it as follows:

The status of separate employer is meaningless if his negotiators have to worry at the bargaining table about rejection at Governor in Council level or precipitating a dispute at senior levels in the Public Service over a change that they judge would be acceptable to the senior management of the separate employer as part of a bargain with a bargaining agent but might not be acceptable to T B negotiators for one reason or another.

I am cognizant of the fact that problems have arisen on occasion regarding the capability of separate employers to take timely advantage of situations in which negotiations with a bargaining agent could have been settled more readily had there been no requirement for approval of the settlement by the Governor in Council. However, it has been impossible for me to explore the situation adequately to enable me to make any concrete recommendation with regard to the problem. Consequently, I recommend that the appropriate authorities look into the matter at the earliest opportunity.

FOOTNOTES

1. S.C. 1972, c. 18.
2. Ibid.
3. Ibid, subparagraph 184(3)(a)(ii).
4. Ibid, section 162.
5. The Canadian Air Traffic Controllers Association and the Syndicat Général du Cinéma et de la Télévision also stress professional development in setting out the objects of their organizations.
6. Cf. statistics in paragraph 29.
7. A number of employee organizations do provide in their constitutions for associate membership for persons not included in a bargaining unit.
8. Ships Crews Case No. 1, (1967) PSSR Reports K 47 at K 53.
9. Supra, footnote 1, section 127.
10. S.C. 1948, c. 54.
11. Cf. paragraph 329.
12. Section 45.
13. Section 12 of the Public Service Employment Regulations provides that where an appointment to a position is made from within the Public Service without competition, the responsible staffing officer shall determine the part, if any, of the Public Service and the occupational group and level, if any, in which prospective candidates would have to be employed in order to be eligible to compete if a closed competition were held.
14. Section 41 of the Public Service Employment Regulations provides, inter alia, that where the selection of a person for appointment is made from within the Public Service without competition, every person who would have been eligible to compete if a closed competition had been held shall be deemed to be a person whose opportunity for advancement has been prejudicially affected and such persons must be informed of the name of the person selected and of their right to appeal against the appointment.
15. Bill C-181, 1966.

16. Subsection 57(3) reads as follows:

(3) Nothing in subsection (2) shall be construed as preventing the amendment or revision of any provision of a collective agreement, other than a provision relating to the term of the collective agreement, that, under the agreement, may be amended or revised during the term thereof.

17. Supra, footnote 1.

Chapter 7

THE BOARD

Structure and Organization

331. It has been traditional in Canada to entrust the administration of legislation governing employer-employee relations to a tri-partite board. This model can be traced back to the conciliation boards provided for by the federal Industrial Disputes Investigation Act of 1907.¹ Among the chief advantages attributed to this form of organization are that (a) the Board includes persons who can bring to bear in the decision-making process the special point of view of the party that recommended their appointment, and (b) the tri-partite character of the tribunal gives a psychological assurance to the parties that the tribunal will be independent of the appointing authority, which is usually, whether it be directly or indirectly, a minister of the Crown. The selection of the members of the Public Service Staff Relations Board followed the traditional pattern. The Board consists of a Chairman, a Vice-Chairman and, under the 1973 amendment² to the Public Service Staff Relations Act, up to three Deputy-Chairmen, all of whom are public members of the Board. Four other members are appointed as representative of the interests of the employer and four as representative of the interests of employees.

332. It is my conviction that, at the time when a plan of industrial relations legislation is first inaugurated, a tri-partite administration may be preferable, so that the institution created to

administer the legislation may attain credibility and acceptability. But it would be a mistake for anyone to assume that the representative members of such an institution serve as the advocates of the organization or the party that they were selected to "represent" on the Board. I can state without fear of contradiction that, over a period of thirty years, I have rarely encountered a member, either of the Ontario Labour Relations Board or the Public Service Staff Relations Board, whose motivation, within a relatively short time after his appointment (by which time he had become aware of the attitude of other Board members) was to act merely as the "mouthpiece for his side." Indeed, the notion that representative members continue to be so motivated is an illusion; I am sure the public fails to appreciate adequately the objective character of the deliberations that take place in the executive sessions of a labour relations board. The position was well put by Roach J.A. of the Court of Appeal of Ontario in Re the Ontario Labour Relations Board, Bradley et al. and Canadian General Electric Co. Ltd.:³

I have heard it said that the nominees of management and labour on the Board "represent" one or the other. This may be an appropriate time to say that they "represent" neither. As members of the Board they are independent of both. They occupy a quasi-judicial position and in the discharge of their duties they must act judicially. Sitting in between them is an equally independent chairman. The present incumbent of that position has never been affiliated with either management or labour but it would be quite wrong to say that on that account he is more independent than his fellow members on the Board because as between all the members there can be no gradations of independence. It is impossible to escape the conclusion that the Legislature had confidence that a Board thus constituted would be peculiarly qualified to deal with the practical

problems that arise within the area of the jurisdiction conferred on it and, to borrow Lord Moulton's phrase in a passage in his judgment in Local Government Board v. Arlidge,⁴ that it would discharge its duties "conscientiously and with a proper feeling of responsibility."

333. Once such a board has obtained a substantial measure of acceptability in the community which it serves, and I am so bold as to say that that condition has been met to a substantial degree in the case of the Public Service Staff Relations Board, the need for perpetuation of the tri-partite structure begins to diminish and the value of retaining it must be measured against certain disadvantages. The point has been reached when the nature of these disadvantages ought to be carefully assessed.

334. One of the root concepts of a tri-partite structure is that the representative members, somewhat like the mythical Atlas, become reinvigorated by contact with the groups which they are respectively chosen to represent. So far as the members of the Public Service Staff Relations Board are concerned, my observations over the last seven years indicate that it is only on rare occasions, if at all, that the members even associate with their "nominators," let alone meet with them to discuss trends in union or management policy or in the administration of the legislation. Indeed, I detect a tendency for the parties to look upon Board members who have served for any length of time as having been "corrupted" by the atmosphere and culture of the Board as an institution, as having lost their sensitivity for the special points of view of the respective parties. While this state of affairs may be looked at from one point of view as a tribute to the objectivity of

the Board members, it does cast considerable doubt on whether the tri-partite structure continues to serve what I believe to be one of the main justifications for its introduction into the scheme of things.

335. If one is to assume that a tri-partite tribunal is to be so constituted that, where the interests of a particular organization are concerned, a member of the tribunal who is "representative," using that term in a broad sense, of that organization will have a direct influence on the tribunal's deliberations, that ideal has not been realized in the present organization or operation of the Public Service Staff Relations Board. The legislation today does not permit each bargaining agent - there are 13 - to be "represented" on the Board. Indeed, even if it were possible to include a "representative" of each of the bargaining agents, the objective of having their interests taken into account in the direct fashion indicated earlier could be achieved only if the member of the Board representative of an organization were in attendance when a matter involving the interest of that organization came to be considered. In the Board's experience over the period since the Act came into force, all members have not been able to adjust their schedules so as to be in regular attendance.

336. In my interviews over the past few months, I have been at pains to ascertain whether there is any great desire among the parties for the retention of the tri-partite character of the Board. I have come to the conclusion that, save for some slight hesitation on the part of some of the bargaining agents that the abandonment of the tri-partite structure might weaken the independence of the Board, since the appointing power is in the hands of the government - in their eyes,

the employer - a public member board would be acceptable both to the bargaining agents and to the employer.

337. The tri-partite structure would also be difficult to maintain if the Board is to become a full-time Board, as is recommended in paragraph 340, because to do so would mean that an institution would have to be established several times the size of the one contemplated by the recommendations made in this report, since a tri-partite division of the Board would have to deal with almost every matter that called for the Board's attention.

338. When the authors of the Public Service Staff Relations Act were considering the character of the institutions to be established to administer the legislation, they could do no more than speculate on the size of the workload that would confront those institutions. The experience of the last few years has demonstrated that the Board as presently constituted cannot meet the demands that are now made upon it. It is anticipated that, if the recommendations contained in this report are accepted, the workload of the Board would far exceed that which it has at the present time.

339. The representative members are usually men and women highly respected in the community who have special qualifications for their position on the Board by reason of their experience and outside associations. Such persons almost invariably have other commitments that make it impossible for them to devote all their time to their duties on the Board; they serve on a part-time basis. Sessions of the Public Service Staff Relations Board have averaged roughly two days out of every two weeks. While a number of the representative members have

been in attendance fairly regularly, others have been able to be present less than 50% of the time when meetings were scheduled. I must say that persons qualified to serve on the Board, who can be available on a part-time basis when they are required and who are acceptable to the parties, are rare creatures. That it would be extremely difficult readily to replace those who cannot attend regularly is demonstrated by the fact that, when a representative member has resigned or passed away, many months have gone by before a suitable replacement could be found and appointed.

340. In my considered opinion, it has become imperative to provide for a full-time Board⁵ readily available to deal expeditiously with the many matters that come before it. It is also my recommendation that the functions now performed by the Public Service Arbitration Tribunal and by the adjudicators should be vested in the Board.

341. The view is held in some quarters that interest disputes are of a different order from rights disputes and that the difference calls for a tribunal specially constituted to deal with interest disputes. It is no doubt a fact that matters that now come within the jurisdiction of the Board and within the jurisdiction of adjudicators, which might be characterized as rights disputes, contain less of a subjective and discretionary element than do those that fall within the jurisdiction of the Public Service Arbitration Tribunal. One can readily acknowledge that some persons who are qualified to deal with rights disputes are not readily capable of adapting their thinking to deal with interest disputes. It is also a fact of life that a person who deals with interest disputes tends from time to time to become persona non

grata to one or other of the parties, so that his decision, in so far as that party is concerned, lacks acceptability - a quality that is of much greater importance in interest than in rights disputes. Nevertheless, it is my considered opinion that the risks attendant upon the merging of the functions of the Board and those of the Arbitration Tribunal are more than offset by the benefits that would flow from the merger.

342. Although the number of references to arbitration has increased over the years, there is still an insufficient volume to warrant the assignment of full-time personnel to the Tribunal. At most, for the immediately foreseeable future, there would be a need for no more than one full-time person and, as was pointed out earlier, it is desirable in dealing with interest disputes to have several persons officiate so as to avoid undue exposure of the same individual. If the functions of the Tribunal were transferred to the Board, there would be a substantial pool of persons on whom to draw as occasion required. Indeed, if it were necessary to do so, several divisions of the Board could sit at the same time and deal with a number of references, thus speeding up the process of arbitration and reducing delays that can only cause frustration. In addition, by introducing a measure of flexibility in the composition of the Board in the manner to be discussed in paragraph 347, it would be possible to train additional persons to participate in the disposition of interest disputes, a course which is not feasible in the present circumstances. Another advantage of this arrangement would be that progressively the members of the Board would become better acquainted with the needs and special conditions of the Public

Service and with the requirements of both parties in the bargaining process.

343. There is no appreciable difference in kind between the functions of adjudicators and those of the Board; in both instances, the function is primarily of a judicial nature. Under the general labour relations legislation, the functions are vested in different entities, probably because it was the conventional wisdom at the time when such legislation was first introduced that grievance arbitration was a consensual matter and therefore the parties should be free to refer differences as to the meaning or application of a collective agreement to the arbitrator of their choice. The perpetuation of the practice of free choice of the arbitrator in the private sector also probably reflects a distaste in some quarters for the establishment of something that looks like a labour court.

344. These reasons have little significance for the situation in the federal Public Service. Adjudicators under the Public Service Staff Relations Act are not selected by the parties, but are appointed to office by the Governor in Council on the recommendation of the Public Service Staff Relations Board; even after their appointment, they are not selected by the parties from a panel of appointed adjudicators, but are assigned to a particular reference by the Chief Adjudicator. There is a provision in the Public Service Staff Relations Act which may be construed as enabling the parties to a collective agreement to name in their agreement an adjudicator to whom differences are to be referred,⁶ but there would appear to be only one agreement in which such an adjudicator was named.⁷ There is also a provision in the Act which

allows an aggrieved employee to request that his grievance be referred to a tri-partite board of adjudication.⁸ The establishment of such a board is dependent however upon the concurrence of the employer and, up to the present time, the employer has rejected every such request that has been made.

345. Another concept that has probably had an impact on the system of free choice of an arbitrator that obtains in the private sector is that the award of an arbitrator should not be regarded as having precedential significance for other arbitrators, that each agreement generates its own jurisprudence adapted to the needs of the parties bound by the agreement. It is difficult to assess with any degree of accuracy to what extent this view of the character of arbitration is in line with what is actually going on in the private sector. The publication of the reasons for arbitration awards and the frequency with which such reasons are cited in argument and in reasons for award in subsequent cases leave one with the impression that some sort of industrial relations jurisprudence is emerging even in private sector arbitration. In the federal Public Service, the inclination to regard prior decisions as having precedential value is much greater than it is elsewhere. That is not to say that all prior decisions of adjudicators are binding precedents for the future. However, with the multiplicity of collective agreements in the Public Service, many of them having identical or very similar language, it would not be a happy situation to have widely divergent awards on similarly worded provisions in two or more agreements. The integration of the functions of the adjudicators with those of the Board therefore would not appear to violate

any fundamental principle of industrial relations. It would also make it possible to assign more than one adjudicator to an important case, so that a combination of minds might be brought to bear on a complex issue.

346. As was pointed out in paragraph 336, one of the problems associated with the appointment of a public member board to deal with the Public Service is that of making it clear beyond question that appointments to the Board are not governed by the interest of the employer or by political considerations. Nothing I have said in this connection should be taken as suggesting in any way that those responsible for the appointments that have been made so far have been motivated by anything other than the desire to find the most qualified persons that could be recruited. However, it is imperative that any possible suspicion that the bargaining agents might have on this score regarding future appointments be completely set at rest. To achieve such a result, I recommend that appointments to the Board be made by the Governor in Council after consultation with the employer and the bargaining agents, that appointments be made initially for a period of five years, the appointees to be removable only on address of the Senate and the House of Commons (as is the case with regard to the Chairman, the Vice-Chairman and the Deputy-Chairmen under the Act as it stands) and that, after the conclusion of the initial five-year period, a board member should be continued in office on the recommendation of the Chairman of the Public Service Staff Relations Board until attaining age 70.⁹

347. It is further recommended that the Board should consist of a chairman, three vice-chairmen, and as many other full-time members, not less than five, as may be determined by the Governor in Council to be necessary to enable the Board to perform its functions adequately. One of the vice-chairmen should be designated the senior vice-chairman in whom would be vested authority to act in the place and stead of the Chairman during his absence or inability to act, or where there is a vacancy in the office of Chairman. The Board should be composed of a mix of persons who have had legal training and laymen acquainted with various aspects of employer-employee relations. Some of the members should be drawn from those who have participated in collective bargaining on the side of employers and some who have participated in collective bargaining on the side of employees. The main core of the Board should consist of full-time members, i.e., persons who would devote all their time to their duties on the Board. However, it would be desirable to continue in office as members of the Board the Chairman and the Alternate Chairmen of the present Public Service Arbitration Tribunal so that the Board might avail itself of the expertise they have developed and the experience they have gained in a highly specialized field. Since it is my understanding that none of them would be prepared to serve on the Board on a full-time basis, provision should be made to retain their association with the administration on a part-time basis, i.e., they would serve only on call of the Chairman. It would also be advisable to retain on a part-time basis a number of adjudicators resident in various parts of the country who could be called upon to act as members of the Board if the full-time members

were not readily available.¹⁰ There is one further reason for part-time membership on the Board being extended to some persons. The Board has an unparalleled opportunity to train, qualify and gain acceptability for grievance arbitrators. A training scheme on a very small scale was instituted several years ago and a more extensive scheme was instituted in the fall of 1973. Capacity to continue this program should be maintained.

348. Classification is in part an art and in part a science. Skilled practitioners in this field require a broad understanding of the organization and work of the Public Service and considerable experience in this area of personnel administration. Needless to say, those who are called upon to sit in judgment on the validity of decisions of classification officers must possess these same qualities in even higher degree if they are to provide both the employer and the employees with the assurance of competent and objective disposition of classification grievances. It is therefore my recommendation that the members of the Board to whom classification grievances should be referred should be specialists particularly qualified to deal with classification problems. It is difficult at this time to assess how extensive the workload of adjudication of classification grievances may be. One member of the Board, perhaps two, would be required on a full-time basis. If more resources become necessary, it should be possible to recruit one or two additional members on a part-time basis, probably from among retired public servants with wide experience in classification matters who continue to enjoy the respect and confidence of the employer and the bargaining agents in this area.

349. It is recommended that the Chairman of the Board should be entrusted with authority to determine the composition of a division of the Board to entertain any type of application and to assign members to divisions, a division to consist of one member or any odd number of members, as the Chairman in his discretion should determine having regard to the nature of a particular proceeding. In this manner, the best use could be made of the talents of Board members and flexibility could be maintained to adjust to caseload, emergency situations and the significance of issues in any particular proceeding. It would also enable the members to be rotated so as to gain experience in a variety of matters that would come before the Board.

350. It is further recommended that, in certain types of proceedings, the division of the Board assigned to a case could have the assistance of non-voting advisers¹¹ as well. In interest disputes, two non-voting advisers, one representative of the interests of each of the parties, should be added to the division of the Board that hears and determines the application. The advisers should, in the main, be drawn from two standing panels, each appointed by the Board on the nomination of the respective parties. The members of the panels would thus be in a position to accumulate knowledge of and experience with the problems of the Public Service and of their respective nominators. However, any party to a proceeding should be entitled, with the approval of the Chairman, to appoint an ad hoc adviser for a particular case, rather than have a member of the appropriate panel designated. No adviser should be entitled to make any report or observation with respect to the decision of the Board.

351. Advisers can also play a useful role in connection with disputes other than interest disputes. Thus, since there is a vast number of positions in the Public Service that are subject to classification and since the number of members of the Board regularly assigned to deal with classification grievances would of necessity be relatively small, there may be instances in which the Board member assigned may lack comprehensive knowledge in depth of all the factors that enter into a particular classification standard. It might be argued that, since a hearing on such a grievance is an adversary proceeding, the onus is on the parties to that proceeding to produce before the Board all the evidence upon which the Board should make its decision. It has been my experience since 1967, especially where highly technical information is being placed in evidence before the Board, that the quality of presentation in many cases leaves something to be desired. Board members have often had to involve themselves in extracting from witnesses relevant information of the utmost significance for their understanding of the issues being brought before them. I have learned from the Chairman and the Alternate Chairmen of the Public Service Arbitration Tribunal and from the adjudicators that the same situation from time to time obtains in proceedings before them. To probe for essential facts is generally profitable only where the tribunal has some knowledge of what it ought to look for. Since classification is such a complex field, I believe that some attempt should be made to offset possible deficiencies of the adversary system as it might apply to classification grievances. The desired objective could be achieved by permitting each of the parties to a classification grievance that has

been referred to the Board to nominate one adviser, if the party so desires, to sit with the Board throughout the hearing and to assist it in determining the matters at issue. In some instances, neither party would deem it necessary to nominate an adviser. In others, only one of the parties might make such a nomination, the other refraining from doing so because of its confidence in the professional integrity and competence of the person nominated by the first party. The decision on the grievance would be made by the Board alone and no adviser should be entitled to make any report or observation with respect to the decision.

352. Indeed, it might be desirable for the Board to have the assistance of advisers in other types of cases as well. It is therefore recommended that the Chairman of the Board be vested with discretion, either on request of one or both of the parties or on his own initiative, to have an adviser or more than one adviser sit with a division of the Board in any proceeding.

353. Subsection 13(2) of the Act permits a member of the Board, who ceases to be a member for certain specified reasons, to complete any cases in which he was involved while he was still a member. This permission does not apply to a member who resigns. Section 112 of the Canada Labour Code¹² makes provision for continuance of a member in office in such circumstances. It is recommended that a similar provision be included in the Public Service Staff Relations Act.

Powers of the Board

354. Subsections 19(1) and 20(1), which set out the powers of the

Board to make regulations of general application and to examine and inquire into certain matters, and section 22, which deals with the power of the Board to summon witnesses and to compel them to testify and to produce documents, limit the Board's powers to do so to certain specified types of applications or proceedings. These limitations have hampered the Board in carrying out some of its responsibilities under the Act. It is recommended the provisions referred to above be amended to empower the Board to make regulations respecting the hearing and determination of any matter that lies within its jurisdiction, to examine and inquire into all types of complaints that may be made that an employee, the employer, an employee organization or an officer, official or person acting on behalf of any of them, failed to give effect to any provision of the Act, and to summon witnesses and compel the production of documents as may be requisite to the proper conduct of all proceedings within the jurisdiction of the Board.

355. If the recommendation made in paragraph 340 for the vesting in the Board of the functions now performed by adjudicators is accepted, the foregoing recommendation concerning the powers of the Board would be applicable to members of the Board dealing with the adjudication of grievances. It should be noted that arbitrators operating under provincial labour relations legislation have enjoyed such powers for many years and similar powers have now been conferred upon arbitrators acting under the Canada Labour Code¹³ by section 157 of the Code.

356. One further problem, in connection with summoning witnesses and compelling the production of documents, calls for comment. Should the Board have power to compel the attendance of a witness who refuses

or fails to appear in answer to a summons, or to compel a witness who has appeared to testify, if he refuses to do so, or to compel production of a document if the department or agency concerned claims privilege? I am reluctant to answer the question in the affirmative, since the member or members of the Board involved in a proceeding where such a situation arose might be persons not steeped in the niceties of the complicated legal principles applicable in such instances; the appropriate recourse in such circumstances is of a drastic nature. Since no distinction should be made between the authority to be exercised by members of the Board trained in the law and those who have no such training, I recommend that the power to compel attendance of witnesses or to compel them to testify or to produce documents where privilege is claimed, as distinct from the power to issue a summons, should not be conferred upon the Board. I recommend further that authority in that respect should be declared in the Act to lie with the Federal Court, which should be empowered to deal with such matters on motion made on behalf of the Board. In so far as the production of documents is concerned, the Federal Court Act¹⁴ now contains a provision that suggests the process that might be suitable. It reads as follows:

41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the

proper administration of justice outweighs in importance the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

357. Under section 23 of the Act, the Board is vested with jurisdiction to review decisions of the Arbitration Tribunal and of adjudicators on questions of law or jurisdiction. I was greatly troubled in seeking an answer to the question as to whether this section should be retained either in its present or in an altered form. Divergent views on this subject were presented to me in the course of my interviews with the parties.

358. Decisions of the Board are now subject to review by the Federal Court of Appeal under section 28 of the Federal Court Act.¹⁵ Decisions of the Arbitration Tribunal and of adjudicators are subject to review by the Board and, alternatively or ultimately as well, by the Federal Court of Appeal. If the Board is reconstituted in the manner set out in the recommendations in this chapter and if the functions of the Arbitration Tribunal and of the adjudicators are transferred to the Board, several paths are open in dealing with section 23. (a) The pattern of the present section could be preserved by making decisions of the Board relating to interest disputes and grievance disputes subject to review by an "appellate" division of the Board. (b) All decisions of any division of the Board could be made

subject to review by such an "appellate" division. (c) Section 23 could be deleted and all decisions of the Board made subject to review only by the Federal Court of Appeal.

359. It makes some sense to have the decisions of one tribunal subject to review by another tribunal, as is presently the case with regard to the relationship between the Board, the Arbitration Tribunal and the adjudicators. There would appear to be little justification for making some matters that would fall within the jurisdiction of the reconstituted Board subject to "internal" review but to exclude others, as would be the case under the first option. To adopt the second option and make every decision of any division subject to such internal review would mean the addition of a possible further step in the processing of such applications where such a step is not now provided. Such a course would be warranted only if it could be demonstrated that it would materially advance the purpose of the legislation.

360. The fact is that references to the Board under section 23 have involved lengthy delays and much frustration for the parties in the disposition of certain matters and it is unlikely that even the reconstituted Board would be able to deal with such matters expeditiously without a great increase in the size of the Board; some members would have to devote their full attention to review proceedings. In my opinion, it is difficult to justify the additional cost or time that would be involved.

361. There is also another consideration that should be taken into account. Questions of law and jurisdiction involve highly complex

legal concepts and principles, by no means confined to labour relations law but extending as well into many facets of the common law and statute law. Many administrative agencies are today staffed in whole or in part by laymen who are called upon to give consideration to such concepts and principles in the first instance in the course of arriving at a decision on matters that have been entrusted to them for determination. However, I do not know of any other instance in which there is a counterpart of section 23 of the Public Service Staff Relations Act, authorizing a body which may conceivably consist entirely, and in the case of the Public Service Staff Relations Board does consist in large part, of laymen, to determine whether another tribunal has erred in law or exceeded or failed to exercise its jurisdiction in arriving at a decision. I therefore recommend that section 23 of the Public Service Staff Relations Act be deleted.

362. Section 25 of the Public Service Staff Relations Act vests in the Board adequate authority to reconsider any decision it has made and to alter or amend it, if it comes to the conclusion that circumstances warrant such alteration or amendment. Included in such authority is that of correcting any error, whether it be in law, jurisdiction or otherwise, the Board may have made if it is shown that it has erred. It is my recommendation that section 25 be retained. However, it ought to be amended to fix a fairly short time limit, say three months, within which an application for reconsideration may be made. Provision should also be made in the section for the Board to review inconsistent decisions of the several divisions of the Board upon leave being granted by the Chairman.

363. The Canadian Union of Postal Workers and the Letter Carriers Union of Canada have both pressed upon me the view that decisions of adjudicators should not be subject to review in any manner by the Federal Court or any other court. The spokesmen for these organizations pointed to a provision in the Canada Labour Code that, in their opinion, barred such review. Subsection 156(3) of the Canada Labour Code¹⁶ reads as follows:

For the purposes of the Federal Court Act, an arbitrator appointed pursuant to a collective agreement ... is not a federal board, commission or other tribunal within the meaning of that Act.

The spokesmen for the two organizations were of opinion that the inclusion of a similar provision in the Public Service Staff Relations Act would give absolute finality to decisions of adjudicators so far as review by the courts is concerned. It appears to me that, while the inclusion of such a provision might bar statutory review of adjudicators' decisions under section 28 of the Federal Court Act, it would leave untouched the traditional avenues for review by way of the prerogative writs. I cannot see that any recommendation along the lines proposed by the two organizations would serve any useful purpose, especially in view of the way in which the courts have interpreted and applied privative clauses over the years.

FOOTNOTES

1. S.C. 1907, 6-7 Edward VII, c. 20.
2. S.C. 1973 - 1974, c. 15.
3. [1957] O.R. 316 at 331.
4. [1915] A.C. 120 at 150.
5. Cf. paragraph 347.
6. See definition of the term "adjudicator" in section 2 of the Act.
7. The collective agreement of the printing operations non-supervisory unit contains the following clause:

ARTICLE 24

NEW RATES

24.01 The Employer agrees to give the Council forty-five (45) days' notice in writing of its intent to place in operation new printing equipment of a type not used by the Employer at the date of signing of this Agreement, and to establish new classifications, if required for the positions required to operate or maintain the equipment in question, provided such maintenance work falls within the Council's jurisdiction. During such forty-five (45) day period, the Employer will meet with the Council for the purpose of negotiating wage rates for the new classification.

24.02 In the event that agreement cannot be reached within sixty (60) days from the date on which notice is given, as specified in clause 24.01, the matter shall be submitted to Mr. J. Stanley, 608 Argyle Ave., Westmount, P.Q., who will render a final decision, binding on both parties.

24.03 The arbitrator's fees and his travelling expenses shall be shared equally by the Council and the Employer.

24.04 The wage rates, whenever finally determined, shall be retroactive to the date of the beginning of operation of the new machine.

A person named in an agreement could be appointed a part-time member of the Board for the duration of the agreement.

8. Sections 93 and 94 of the Act.
9. The recommendations as to the term of the initial appointment or tenure on reappointment should not apply to persons appointed on a part-time basis.
10. Part-time members of the Board should be limited to the exercise of the functions of the Board in matters assigned to them by the Chairman.
11. The qualifications for appointment as an adviser should be the same as those required for appointment to the Board. Section 13(1) of the Act reads as follows:
 13. (1) A person is not eligible to hold office as a member of the Board if
 - (a) he is not a Canadian citizen;
 - (b) he holds any other office or employment under the employer;
 - (c) he is a member of or holds an office or employment under an employee organization that is a bargaining agent; or
 - (d) he has attained the age of seventy years.
12. S.C. 1972, c. 18.
13. Ibid.
14. R.S.C. 1970, (2nd supp.) c. 10.
15. Ibid.
16. Supra, footnote 12.

Chapter 8

THE PAY RESEARCH BUREAU

364. As Professor H. W. Arthurs pointed out with regard to interest disputes,

Even the best informed arbitrator cannot arrive at his decision by a mere mathematical exercise. What criteria should the arbitrator use in determining wages or other working conditions? Should the public employer be an exemplar and treat its employees as well as they could possibly be treated in private industry or should government define its primary obligation as providing the public with service at the lowest possible cost in wages? Or, should some totally different standard govern?¹

The Public Service Staff Relations Act has attempted to answer these questions by setting out certain factors to be taken into account in the arbitration of interest disputes. Section 68 of the Act reads as follows:

In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute, the Arbitration Tribunal shall consider

- (a) the needs of the Public Service for qualified employees;
- (b) the conditions of employment in similar occupations outside the Public Service, including such geographic, industrial or other variations as the Arbitration Tribunal may consider relevant;
- (c) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
- (d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the

responsibility assumed and the nature of the services rendered; and
(e) any other factor that to it appears to be relevant to the matter in dispute.

365. By enacting section 68, Parliament has in effect established a policy for the determination of terms and conditions of employment in the Public Service, since the section serves as a guideline not only for the Arbitration Tribunal but must also inevitably influence the parties in the conduct of their negotiations. If the bilateral decision-making process is to merit the confidence of the citizens, it must not only have at its disposal reliable and objective information, but it must have that information readily available at times when it can best serve the needs of all concerned. The collective bargaining process being what it is, both sides should have an input in the design of survey programs which elicit, compile and analyze relevant data and in evaluating whether such programs are to be expanded, modified or discontinued. What role has the Pay Research Bureau played in the collective bargaining process in providing data in the past and what is the role, if any, that it should play in the future?

366. The Pay Research Bureau was brought into being in 1957 to provide the Civil Service Commission with objective data, secured in a systematic and professional way, for use as a basis for its recommendations to the government on pay changes in the Public Service. At the time of the coming into force of collective bargaining legislation, it was continued in existence, on the recommendation of the Preparatory Committee on Collective Bargaining in the Public Service, as an agency of the Public Service Staff Relations Board. The

Preparatory Committee was fairly cautious in evaluating the possible usefulness of the Pay Research Bureau in the new scheme of things. It stated in its report:

It may be argued that, in an environment conditioned by collective bargaining, there will be no need or no continuing desire for an independent unit charged with a responsibility to supply both employer and employee representatives with objective information on the rates of pay and conditions of employment prevailing outside the Public Service. According to this argument, the parties to bargaining will want to rely on their own sources of information and will be reluctant to accept and use information supplied by a neutral body.

The Preparatory Committee is not prepared to accept the assumptions on which this argument is based. It is possible that the need for an independent pay research unit will diminish under the pressures of collective bargaining. In the opinion of the Committee, it is equally possible that it will increase. Much will depend on the attitude of the parties and the conditions created by a system characterized by arbitration as the means of dispute settlement. In any event, the Preparatory Committee has concluded that, in the foreseeable future, there will be both a need and a vital role for an independent pay research unit. It has concluded also that, in the new situation, the unit would be best located as an adjunct to the Public Service Staff Relations Board, where it could continue to enjoy an atmosphere conducive to impartiality and at the same time operate in close proximity to the other "third-party" functions.² (emphasis added)

It is to the underlined words in this statement that we must direct our attention.

367. In so far as the attitude of the bargaining agents is concerned, there was quite a difference of opinion among them as to the degree to which they rely on Pay Research Bureau data. Practically

all of them agreed that they found a number of the publications of the Bureau of value, such as the Report on Benefits and Working Conditions (which deals with such matters as life and health insurance plans, income insurance plans, pension plans, hours of work, time away from duty, technological changes, premium pay, financial benefits and working conditions) and the Analysis of Canadian Public Service Collective Agreements. Most of the smaller organizations and those that were concerned only with employees in a single occupational group claimed they made little use of the wage data produced by the Bureau. There were a number of reasons given. Several felt that the occupations of the employees they represented had no "real" counterpart in the private sector. Others said that the reports were too out of date to suit their purposes. In several instances, the employee organization concerned lacked the capability in terms of money or personnel to participate regularly in the meetings of the Advisory Committee of the Pay Research Bureau and thus did not have a meaningful input to the surveys prepared by the Bureau.

368. The two largest organizations in the Public Service, the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada, expressed their support for the Bureau but added that there were some shortcomings which should be corrected. It was suggested to me that one of the problems that officers of the bargaining agents encountered in dealing with their members regarding Pay Research Bureau data was that, since the Bureau is not specifically identified in the Public Service Staff Relations Act as part of the Board operation, their members had the impression that the surveys

prepared by the Bureau were not the work of a truly independent agency and might be unduly influenced by the employer.

369. As to the views of one person on the employer's side, one can quote the words of Mr. Russell Steward, Assistant Deputy Secretary of the Treasury Board, in an address on March 28, 1973 to a conference at the Industrial Relations Centre of McGill University:

In the performance of its duties a public service Arbitration Tribunal is considerably aided by the objective data obtained by the Pay Research Bureau (a division of the Public Service Staff Relations Board) and the Tribunal addresses itself to the representations of the parties - employer and union - in the interpretation of that data. The Pay Research Bureau, a widely known and respected bureau, has functioned effectively for many years and serves the interest of the public by forcing the parties to conduct their compensation disputes around data that was obtained expressly for the parties and in a manner that is fully understood by them. Moreover, the modalities of data collection are influenced jointly by the parties through prior consultation with the Pay Research Bureau.

It would seem a sine qua non of "special treatment" for essential service employees that there be available objective data (obtained by an independent body) which can inform an Arbitration Tribunal in its deliberations. If Arbitration Tribunals cannot reconcile the conflicting data obtained and produced separately by the two litigants, its task becomes extremely difficult, the process is prolonged, the public interest is not served, and essential service employees may justifiably feel their demands have not received fair consideration.

370. It is fair to say that conciliators, conciliation boards and the Arbitration Tribunal rely heavily on information supplied by the Pay Research Bureau. Lest there be any misunderstanding of this

statement, I would point out that the Arbitration Tribunal, which exercises a quasi-judicial function, resorts to Pay Research surveys only (a) where the contents of those surveys are relied upon in the course of the presentation on a reference, or (b) if additional information is produced at the request of the Tribunal, where that fact has been brought to the attention of the parties and they are afforded an opportunity to comment on it or to offer rebuttal testimony.

371. Again, over the years, many students of collective bargaining and practitioners in the field have repeatedly stressed the need for objective information of the sort prepared by the Pay Research Bureau. The situation has been well described by Dr. A.W.R. Carrothers in a recent address to the Society of Professionals in Dispute Resolution:

Whether the guidelines are derived by legislation or other decree or by agreement of the parties, they must be backed by reliable data. The greater the confidence the parties have in the data to be applied to the guidelines the more likely they will reach agreement on their own. In my view the strongest source of reliable data is an independent fact-supplying institution. It can take many forms and I am comparatively indifferent about them provided they carry the qualities of independence, competence and relevance. Failing that, the arbitrator may have to be served by evidence supplied via the adversary process, a tedious and hazardous and uncertain exercise. Failing that, evidence by the inquisition process may be resorted to, with the arbitrator assuming considerable initiative. Fourth, and worst of all, is what I call "hidden evidence," what the arbitrator knows or thinks he knows or what may be picked up and exchanged at random in the deliberations of the tribunal.

372. That other jurisdictions entertain similar views as to the

need for the gathering and dissemination by a neutral body of data such as is made available by the Pay Research Bureau is evident from a number of reports of commissions of inquiry into collective bargaining³ and by the constant stream of visitors to consult with the staff of the Pay Research Bureau and inquiries from Canadian and foreign jurisdictions concerning its functions, objectives, structure and methodology. Indeed, the desirability of having data that emanates from an independent source also has the endorsement of leading spokesmen from both sides in industry in the private sector.⁴ In short, there is widespread agreement that, if arbitration is to be an acceptable method of settling interest disputes, there must be in existence an independent agency that will provide essential accurate information and not drive the arbitrator, as has been well said, "to rely on the often haphazard and self-serving wage and benefit data supplied by the parties."⁵

373. The independence of the Pay Research Bureau can be assured for the time being, I believe, only by keeping it under the administrative control of the Public Service Staff Relations Board. It may be that, at some time in the future, an independent national "compensation agency" may be established to serve industry and government throughout Canada. To establish such an agency is not an overnight job and, more important, it would require time for it to gain credibility in the community. In the present circumstances, I am firmly convinced that the transfer of the Bureau to any department of government, no matter what safeguards may be introduced either on paper or in fact to guarantee its neutrality or objectivity, would not allay the fears of some public servants concerning its independence.

374. What can be done to overcome suspicions that the Bureau is not improperly influenced by the employer? It has been suggested to me that the Public Service Staff Relations Act should be amended by adding to it a section or group of sections defining in express terms the status and role of the Pay Research Bureau. The Bureau came under the jurisdiction of the Board on March 13, 1967 by Treasury Board Minute, after operating for ten years within the jurisdiction of the Civil Service Commission.

375. I am not persuaded that a formal statutory declaration acknowledging the existence of the Bureau, coupled with a statement that it should continue to exist, is necessary. Simply to say that much and no more would serve no useful purpose. To include in the Act a provision defining in some detail the organization of the Bureau and its terms of reference would, I believe, introduce an undesirable degree of rigidity into the operation of what must be a developing and dynamic institution adapting itself continually to changing conditions. The needs of the situation could best be met by adding a provision to the Act empowering the Board to collect, analyze, present and make available data relating to wages, benefits and employment practices in public and private employment and I so recommend.

376. One of the problems that the Bureau has encountered is that of producing survey findings concerning certain occupational groups sufficiently up-to-date and within a time frame appropriate to their negotiation calendar. It must be recognized that the Bureau will probably always experience some difficulty in responding fully to the needs of the parties; the expiration dates of agreements in the Public

Service are set by the parties to those agreements as best suit their interests and convenience without regard in most cases for the capacity of the Bureau to gather, compile and publish the data they may wish to have for their next round of bargaining or to a survey timetable consistent with the most efficient utilization of resources and minimal burden on respondents. The complexity of the problem is compounded by the fact that the parties may want trend data well in advance of the date set for the commencement of negotiations, as they go about developing in their own time their strategy for bargaining. Surveys are not produced merely by turning the starting switch of a computer. In addition, many groups have claims on the resources of the Bureau at any one time.

377. It is to be expected that the Bureau will inevitably be more responsive to the needs of the bargaining agents, the Treasury Board and those separate employers who regularly look to it for information. Every institution of government has only limited resources and there is a strong tendency to employ available resources in areas where it is made evident to the institution that the product of its efforts is desired and will be used to some advantage. The Bureau has been conscious and concerned that its services were not being fully utilized by all bargaining agents and employers. If sufficient staff were available more would undoubtedly be done to ascertain requirements and demonstrate how a useful service can be afforded those bargaining agents who now make scanty use of its findings and research.

378. One of the important challenges that the Bureau faces, if it is to occupy the prominent position that I envisage for it, is that of

its orientation for the future. The reward systems of the Public Service are not and cannot remain static. There is an urgent need for study and analysis of the existing Public Service systems and of new developments in other enterprises to ascertain whether the present systems meet the needs of the Public Service community and, if they do not, to be in a position to plan and organize the provision of data that will pave the way for change. I cannot emphasize too strongly the need for intensive research on national and regional economic and compensation trends and developments and on changing employee values and expectations in the community.

379. Substantially more effort needs to be devoted to the developmental planning, analysis and research which must precede technical innovation and which affects the economical use of resources and responsiveness to new information needs. Endeavours of this sort may not all have immediate tangible value but, in the long term, they help to guarantee the continued effectiveness of the organization. The Bureau has been conscious of the need for more long term research but has been constrained by the limited finances available for such purposes and the difficulty of obtaining long term commitments. The resulting status quo atmosphere has inhibited the planning and evolution of programs to meet future needs.

380. The suggestions I have made contemplate a substantial expansion of the developmental and research functions of the Bureau. Their importance might be made clearly apparent by including in the Act a provision that the Board has a responsibility to study and analyze criteria and guidelines for the determination of interest disputes.

In the final analysis, however, development of the capacity of the Bureau to conduct the research connected with this responsibility can only come about if the responsible authorities make resource commitments that would encourage the Bureau to engage in long term planning so necessary if these objectives are to be attained, commitments that would take into account the size of the total payroll of the Public Service, using the term in its widest sense.

FOOTNOTES

1. "The Arbitral Process," in Proceedings of the International Symposium on Public Employment Labour Relations, New York, May 3-5, p. 134 at p. 135.
2. P. 41.
3. See, for example, The Report of the Committee of Inquiry on Professional Consultation and the Determination of Compensation for Ontario Teachers, June 1972.
4. See, for example, H. J. Clawson, Vice-President of the Steel Company of Canada, in The Current Canadian Industrial Relations Scene, Arbitration or Strikes? (Industrial Relations Centre, Queen's University, Kingston, Ontario, 1972, Reprint Series No. 19); William Mahoney, Canadian Director of the United Steelworkers of America, in addresses to the Automotive Transport Association of Ontario and to the Canadian Club, reported in the Toronto Globe and Mail, March 26, 1968.
5. Clawson, op. cit., 8.

Chapter 9

SOME CONCLUDING REMARKS

The Post Office: Proposal for
the Establishment of a Crown Corporation

381. The Canadian Union of Postal Workers and the Letter Carriers Union of Canada have long advocated that the Post Office Department become a crown corporation and that the rights of postal employees to collective bargaining should be identical with those of the employees of private employers within the federal jurisdiction. Their representations in this regard were referred to in the current review. My response to this proposal is two dimensional. First, I do not believe that the issue of collective bargaining for employees, per se, can or should determine whether or not the Post Office should be administered as a crown corporation. There are major considerations to be weighed in such a proposal which have nothing to do with collective bargaining, and for that reason fall outside the scope of this review. Second, in relation to the original objective of the two organizations, to secure collective bargaining rights for their members, I believe that the rights available to them under the present legislation, enlarged as they would be if the proposals contained in this report are accepted, give them substantially what they set out to secure. With the modifications which I have proposed in relation to lay-off, transfers, classification and superannuation, nothing of significance is excluded from bargaining that is familiarly bargained in the private sector. What is preserved in statute - the pension plan and the

service-wide statutory preference for laid off employees - provides protection superior to that found in the private sector, with very few exceptions.

382. It should be pointed out that, contrary to fears expressed by the two unions when the Public Service staff relations legislation was enacted, no postal employees have been designated under the provisions of the Act relating to safety and security. Consequently, one of their major concerns, that in a Public Service system their rights would be abrogated by classifying postal operations as an "essential service," has been proved to have no foundation. It should also be pointed out that to bring postal employees within the jurisdiction of the Canada Labour Code without the establishment of a crown corporation, i.e., by order of the Governor in Council under subsection 5(2) of the Public Service Staff Relations Act, as amended by subsection 4(3) of the Canada Labour Code,¹ would be to subject them to a law which provides substantial discretionary authority to a member of the Cabinet, i.e., the Minister of Labour. Given the principle of Cabinet solidarity, it is doubtful whether, in circumstances where the Minister exercised this discretion in a dispute involving postal employees, the postal unions and the public would be able to distinguish the Minister from the employer. To bring postal employees within the provisions of the Canada Labour Code would do violence to the concept, meticulously enshrined in the Public Service Staff Relations Act, that the third-party role in the collective bargaining process in the Public Service should be played by persons completely independent of the employer and of the employees.

Collective Bargaining for Employees of Parliament

383. Representations were made to me by the Public Service Alliance that the Public Service Staff Relations Act should be "extended" to include employees of Parliament. I do not interpret my terms of reference to include this consideration. The relationship of the employees of Parliament to members, and to Parliament as an institution, is a very different one indeed from the relationship of public servants generally to the government as employer. If, as the Public Service Alliance has alleged, the rights of employees of Parliament are not protected in an appropriate manner, this is a problem which will require a solution which should not be encompassed or dealt with in this report.

"Compatibility" of Statutory Provisions

384. Quite a number of statutes enacted by Parliament contain provisions that authorize various authorities to prescribe terms and conditions of employment for public servants. This is particularly so, but is not confined to, statutes relating to the separate employers. Some of the provisions of these statutes appear to confer upon such authorities power to prescribe conditions of employment that might appear to be in conflict with those that may be established under the Public Service Staff Relations Act. It is recommended that the appropriate authorities examine the various statutes and take such steps as may be necessary to remove any problem that may arise because of this state of affairs.

385. In its representations to me, the Treasury Board Secretariat suggested that "the Public Service Employment Act, the Public Service

Staff Relations Act and the Financial Administration Act be amended to provide compatible definitions of the various types of employment and to provide a system which is clear, less complex and more flexible." I agree heartily with this suggestion. Indeed, I would go further and suggest that, in the drafting of regulations and other instruments relating to employment conditions in the Public Service, it might be advisable for those charged with the administration of the three statutes to confer with one another from time to time to ensure that definitions and related matters in any such regulations or instruments issued by each of them are indeed "compatible."

Labour Management Committees

386. The value of labour-management committees has been recognized in industry as an important aid to the development of a healthy employer-employee relations environment. Some committees of this sort have been established in the Public Service and have proved beneficial. I believe that more extensive use should be made of this mechanism. The government agency that promotes the establishment of such committees is the Union-Management Services Branch of the Department of Labour, which has a well known program for that purpose. However, in view of my comments in paragraph 382 about the position of the Minister of Labour, it would appear to be preferable to charge the Public Service Staff Relations Board with the responsibility of working with the parties in the establishment of such committees in the Public Service.

Communication

387. In conclusion, it may not be amiss to draw attention to a

comment in a report issued by the Commission on Industrial Relations of the United Kingdom on "Communications and Collective Bargaining."²

The report states:

It is a commonplace that industrial relations can be harmed by poor communications ... It is obvious that communication of some sort will always go on but a planned system can counteract rumour, assist the conduct of negotiations and improve human relations by helping to develop a climate of trust and confidence between the parties. Developing this approach means first identifying the information to be exchanged periodically at agreed times and before, during and after negotiations. Second, agreed methods and channels of communication must be established and used both within companies and unions and between negotiators on both sides. Third, the effectiveness of these established methods and channels, needs to be checked regularly. Two other points should be noted; first a systematic approach implies a willingness to communicate. This usually means developing the habit of communicating and favourable attitudes towards doing so. Second there is the importance of using language which is understood by both sides and not liable to misinterpretation. Methods and channels should be adequate and appropriate to the needs of the two sides ... We emphasise the importance of a joint approach to achieving systematic two-way communication concerned with the conduct of negotiations although internal communication within management and unions is, of course, a matter for each side to determine on its own. In the absence of a joint approach management's attempts to communicate directly with employees, who may also be union members, on matters considered negotiable can cause disputes. Joint agreements which specify how the communication aspects of negotiations are to be handled by the parties help to prevent such problems.

I heartily recommend that the parties give careful consideration to this counsel.

FOOTNOTES

1. S.C. 1972, c. 18.
2. C.I.R. Report No. 39, London, Her Majesty's Stationery Office, 1973, p. 2.

APPENDIX A

SCHEDULE I

[As amended by SOR/67-359 (*Canada Gazette*, July 26, 1967), SOR/67-510 (*Canada Gazette*, October 25, 1967), SOR/68-34 (*Canada Gazette*, January 24, 1968), SOR/68-152 (*Canada Gazette*, May 8, 1968), SOR/68-154, (*Canada Gazette*, May 8, 1968), SOR/68-181 (*Canada Gazette*, May 22, 1968), SOR/68-495 (*Canada Gazette*, November 13, 1968), P.C. 1968-1760, SOR/69-41 (*Canada Gazette*, February 12, 1969), SOR/69-155 (*Canada Gazette*, April 23, 1969), SOR/69-208 (*Canada Gazette*, May 14, 1969), SOR/70-118 (*Canada Gazette*, April 8, 1970), *Government Organization Act*, Statutes of Canada, 1968-69, c.28, s. 105, SOR/71-349 (*Canada Gazette*, August 11, 1971, SOR/71-403 (*Canada Gazette*, August 25, 1971), SOR/71-355 (*Canada Gazette*, August 11, 1971, SOR/71-360 (*Canada Gazette*, August 11, 1971), *Tax Review Board Act*, Statutes of Canada, 1970-71, c. 11, s.18, *Statistics Act*, Statutes of Canada, 1970-71, c.15, s.39, *Federal Court Act*, Statutes of Canada, 1970-71, c.1, s.64(2), SI/72-78 (*Canada Gazette*, August 9, 1972), SI/72-79 (*Canada Gazette*, August 23, 1972), SI/ 72-85 (*Canada Gazette*, September 27, 1972), SI/73-18 (*Canada Gazette*, March 28, 1973), SI/73-53 (*Canada Gazette*, July 11, 1973), SOR/73-594 (*Canada Gazette*, October 9, 1973), SOR/73-710 (*Canada Gazette*, December 3, 1973).]

PART I *

Departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer.

Departments named in Schedule A to the *Financial Administration Act*.

Agricultural Stabilization Board
 Atlantic Development Board
 Board of Grain Commissioners
 Bureau of Pensions Advocates [added SOR/71-403]
 Canada Labour Relations Board [added SI/73-18]
 Canadian Dairy Commission [added SOR/69-41]
 Canadian Government Elevators
 Canadian Intergovernmental Conference Secretariat [added SOR/73-710]
 Canadian Livestock Feed Board [added SOR/67-359]
 Canadian Penitentiary Service
 Canadian Pension Commission
 Canadian Radio-Television Commission [added SOR/68-181]
 Canadian Transport Commission [SOR/67-510, SOR/68-34]
 Director of Soldier Settlement
 Director of Veterans' Land Act
 Emergency Measures Organization
 Canadian International Development Agency [formerly the External Aid Office P.C. 1968-1760]
 Fisheries Prices Support Board
 Fisheries Research Board [added SOR/70-118] [SOR/71-349]
 Government Printing Bureau
 Immigration Appeal Board [added SOR/68-154]

Information Canada [added SI/72-85]
International Joint Commission /Canadian Section)
Maritime Marshland Rehabilitation Administration
Ministry of State for Science and Technology [added SI/72-78]
Ministry of State for Urban Affairs [added SI/72-79]
Municipal Development and Loan Board
National Capital Commission
National Energy Board
National Library
National Museums of Canada [added SOR/68-152]
National Parole Board
Office of the Auditor General of Canada
Office of the Chief Electoral Officer
Office of the Commissioner of Official Languages [added SOR/70-47] [SOR/71-360]
Office of the Comptroller of the Treasury
Office of the Governor-General's Secretary
Office of the Representation Commissioner
Office of the Superintendent of Bankruptcy
Pension Review Board [added SOR/71-403]
Prairie Farm Assistance Administration
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Archives
Public Service Commission
Restrictive Trade Practices Commission
Royal Canadian Mint **
Royal Canadian Mounted Police
Staff of the Federal Court [Formerly Exchequer Court, S.C. 1970-71, c.1, s.64(2)]
Staff of the Supreme Court
Statistics Canada [Formerly Dominion Bureau of Statistics, S.C. 1970-71, c.15, s. 39]
Statute Revision Commission
Tariff Board
Tax Review Board [Formerly Tax Appeal Board S.C. 1970-71, c.11, s. 187]
The Law Reform Commission of Canada [added SOR/71-355]
Unemployment Insurance Commission
War Veterans Allowance Board

* The following have been deleted:

Air Transport Board [SOR/68-34]
Board of Broadcast Governors [SOR/68-181]
Board of Transport Commissioners [SOR/68-34]
Canadian Maritime Commission [SOR/68-34]
Dominion Coal Board [SOR/73-594]
Feed Grain Administration [SOR/67-359]
National Gallery of Canada [SOR/68-152]
Public Service Staff Relations Board [SOR/68-495]

** Royal Canadian Mint Government Organization Act, Statutes of Canada, 1968-69, c.28, s.105.

** Section 85(3) of the Government Organization Act, Statutes of Canada, 1968-69, c.28, s.105, provides that "Any collective agreement affecting officers and employees of the Mint entered into before the coming into force of this Part remains in force and binds the Mint as employer of such officers and employees until the expiry of that agreement and the provisions of the Public Service Staff Relations Act shall continue to apply during the term of that agreement". The Act came into force on April 1, 1969.

PART II *

Portions of the Public Service of Canada that are separate employers.

Atomic Energy Control Board
Defence Research Board
Economic Council of Canada
Medical Research Council [added SOR/69-208]
National Film Board
National Research Council
Northern Canada Power Commission
Public Service Staff Relations Board [added SOR/68-495]
Science Council of Canada [added SOR/69-155]

The following have been deleted:

Centennial Commission [SI/73-53]
Fisheries Research Board [SOR/70-118] [SOR/71-349]

APPENDIX B

Submissions

Submissions, either written or oral, were made by the individuals or organizations listed below, and personal interviews were held with most of them or their representatives as well.

Alberta School Trustees' Association
Association of Postal Officials of Canada
Atomic Energy Control Board
Canadian Air Traffic Control Association
Canadian Labour Congress
Canadian Manufacturers' Association
Canadian Merchant Service Guild
Canadian National Telecommunications
Canadian Postmasters Association
Canadian Union of Postal Workers
Council of Graphic Arts Unions of the Public Service of Canada
Council of Postal Unions
Defence Research Board
Economic Council of Canada
Federal Government Dockyards Trades and Labour Council
International Brotherhood of Electrical Workers
Letter Carriers' Union of Canada
McLean, Mr. Allan M.
Medical Research Council
National Film Board
National Research Council of Canada
Northern Canada Power Commission
Professional Association of Foreign Service Officers
Professional Institute of the Public Service of Canada
Public Service Alliance of Canada
Research Council Employees' Association
Science Council of Canada
Shingles, Mr. R. D.
Syndicat Général du Cinéma et de la Télévision (CSN)
Treasury Board Secretariat
Victoria Labour Council

APPENDIX C

Occupational Categories and Groups

The definition of "occupational category" in section 2 of the Public Service Staff Relations Act specifies five occupational categories. Subsection 26(1) of the Act provided for the specification and definition by the Public Service Commission of the several occupational groups within each occupational category in such manner as to comprise therein all employees in the Public Service in respect of whom Her Majesty as represented by the Treasury Board is the employer.

A list of the occupational categories and groups, as published in a special edition of the Canada Gazette dated March 20, 1967, appears below:*

SCIENTIFIC AND PROFESSIONAL CATEGORY

- Actuarial Science Group
- Agriculture Group
- Architecture and Town Planning Group
- Auditing Group
- Biological Sciences Group
- Chemistry Group
- Dentistry Group
- Economics, Sociology and Statistics Group
- Education Group
- Engineering and Land Survey Group
- Forestry Group
- Historical Research Group
- Home Economics Group
- Law Group
- Library Science Group
- Mathematics Group
- Medicine Group
- Meteorology Group
- Nursing Group
- Occupational and Physical Therapy Group
- Pharmacy Group
- Physical Sciences Group
- Psychology Group
- Scientific Regulation Group
- Scientific Research Group
- Social Work Group
- University Teaching Group
- Veterinary Science Group

ADMINISTRATIVE AND FOREIGN SERVICE CATEGORY

Administrative Services Group
Administrative Trainee Group
Commerce Group
Computer Systems Administration Group
Financial Administration Group
Foreign Affairs Group
Information Services Group
Organization and Methods Group
Personnel Administration Group
Programme Administration Group
Purchasing and Supply Group
Translation Group
Welfare Programmes Group

TECHNICAL CATEGORY

Aircraft Operations Group
Air Traffic Control Group
Drafting and Illustration Group
Electronics Group
Engineering and Scientific Support Group
General Technical Group
Photography Group
Primary Products Inspection Group
Radio Operation Group
Ships Officers Group
Ships Pilots Group
Social Science Support Group
Technical Inspection Group

ADMINISTRATIVE SUPPORT CATEGORY

Clerical and Regulatory Group
Communications Group
Data Processing Group
Office Equipment Group
Secretarial, Stenographic, Typing Group
Telephone Operation Group

OPERATIONAL CATEGORY

Correctional Group
Firefighters Group
General Labour and Trades Group
General Services Group
Heating, Power and Stationary Plant Operation Group
Hospital Services Group
Lightkeepers Group
Postal Operations Group
Printing Operations Group
Revenue Postal Operations Group
Ship Repair Group
Ships Crews Group

- * A number of the occupational groups are divided into subgroups for purposes of separate standards, pay plans and certain other terms and conditions of employment. For example, the General Labour and Trades Group is broken down into subgroups as follows:

- Elemental
- Machine Tending
- Manipulating
- Machine Driving - Operating
- Machine Operating - Controlling
- Precision Working
- Aircraft Maintaining
- Instrument Maintaining
- Machinery Maintaining
- Vehicle and Heavy Equipment Maintaining
- Boiler-making - Blacksmithing
- Electrical Installing and Maintaining
- Pipefitting
- Sheet Metal Working
- Woodworking
- Machinery, Toolmaking and Engraving
- Construction Inspecting
- Ammunition Working

APPENDIX D

Bargaining Units and Bargaining Agents
in the Public Service of Canada

Treasury Board as "Employer"

<u>Bargaining Unit</u>	<u>Bargaining Agent</u>
Actuarial Science	Professional Institute of the Public Service
Agriculture	
Architecture and Town Planning	
Biological Science	
Chemistry	
Dentistry	
Engineering and Land Survey	
Economics, Sociology and Statistics	
Forestry	
Home Economics	
Historical Research	
Law	
Library Science	
Mathematics	
Medicine	
Meteorology	
Nursing	
Occupational and Physical Therapy	
Physical Sciences	
Pharmacy	
Psychology	
Scientific Research	
Scientific Regulation	
Social Work	
Veterinary Science	
Commerce	Public Service Alliance of Canada
Computer Systems Administration	
Translation	
Aircraft Operations	
Auditing	
Education	
Administrative Services	
Financial Administration	
Information Services	
Purchasing and Supply	
Programme Administration	
Welfare Programmes	
Drafting and Illustration	
Engineering and Scientific Support	
Educational Support	

Bargaining Unit

General Technical
Primary Products Inspection
Photography
Radio Operations
Social Science Support
Technical Inspection
Communications
Clerical and Regulatory
Data Processing
Office Equipment Operations
Secretarial, Stenographic, Typing
Telephone Operation
Correctional - Supervisory
 - Non-Supervisory
Firefighters - Supervisory
 - Non-Supervisory
General Labour and Trades
 - Supervisory
 - Non-Supervisory
General Services
 - Supervisory
 - Non-Supervisory
Heating, Power and Stationary Plant
 Operation - Supervisory
 - Non-Supervisory
Hospital Services
 - Supervisory
 - Non-Supervisory
Lightkeepers - Supervisory
 - Non-Supervisory
Printing Operations
 - Supervisory
Railway Mail Clerks
Ships Crews - Supervisory
 - Non-Supervisory

Foreign Affairs

Air Traffic Control

Electronics

Ships Officers

Postal Operations - Supervisory

Bargaining Agent

Public Service Alliance of
Canada

Professional Association of
Foreign Service Officers

Canadian Air Traffic Control
Association

Local 2228, International Brother-
hood of Electrical Workers

Canadian Merchant Service Guild

Association of Postal Officials
of Canada

Bargaining Unit

Bargaining Agent

Postal Operations - Non-Supervisory
Postal Operations - part-time employees

Council of Postal Unions

Revenue Postal Operations

Canadian Postmasters Association

Printing Operations - Non-Supervisory

Council of Graphic Arts Unions
of the Public Service of Canada

Ship Repair

Federal Government Dockyards
Trades and Labour Council

Defence Research Board as "Employer"

Bargaining Unit

Bargaining Agent

Defence Scientific Service Officers
Professional Category

Professional Institute of the
Public Service

Administrative and Foreign Service
Category

Public Service Alliance of
Canada

Technical Category

Administrative Support Category

Operational Category - Supervisory
- Non-Supervisory

National Film Board as "Employer"

Bargaining Unit

Bargaining Agent

Administrative and Foreign Service
Category

Professional Institute of the
Public Service

Administrative Support Category
Operational Category

Public Service Alliance of
Canada

Technical Category

Syndicat Général du Cinéma et
de la Télévision

National Research Council as "Employer"

Bargaining Unit

Library Science
Research Officers and Research
Council Officers
Communications Officers
Information Services
Translation

Administrative Services
Computer Systems Administration
Purchasing and Supply
Technical Category
Communications - Supervisory
 - Non-Supervisory
Clerical and Office Equipment
Data Processing
Secretarial, Stenographic, Typing
Operational Category
 - Supervisory
 - Non-Supervisory

Bargaining Agent

Professional Institute of the
Public Service

Research Council Employees
Association

Northern Canada Power Commission as "Employer"

Bargaining Unit

Operational Category - Non-Supervisory

Bargaining Agent

Public Service Alliance of
Canada

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